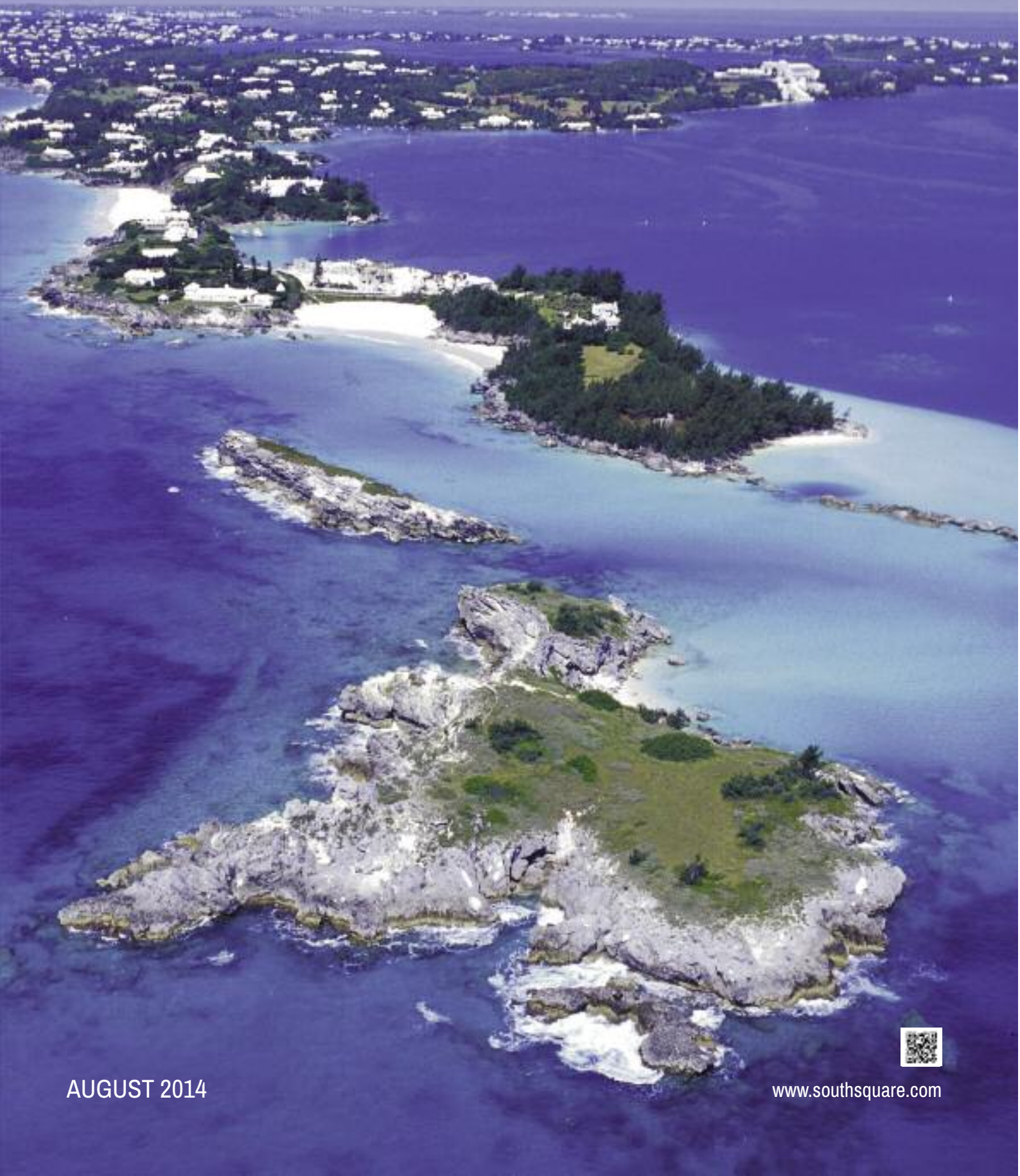
SOUTH SQUARE DIGEST

A REGULAR REVIEW OF NEWS, CASES AND ARTICLES FROM **SOUTH SQUARE BARRISTERS**



AUGUST 2014

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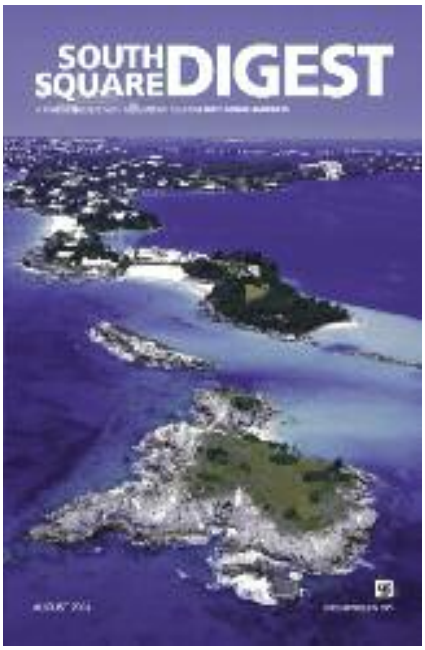
FEATURE ARTICLES



FROM THE EDITOR

DAVID ALEXANDER QC

Summer Comes Around

Once again we reach the summer edition of the Digest. How the year flies by once one eventually gets through February and March!

What is more it has been quite an action packed spring and summer. What with the World Cup (a wonderful spectacle apart from the Suarez bite and the first semi-final when the Germans thrashed the hosts in a game which contained that extraordinary six-minute period of four German goals), and the Grand Depart to the Tour de France in Yorkshire. Incredible to see so many people lining the roads. But one has to say it has not been a great spring and summer for England. Dumped out of the World Cup at the group stage. Lost a test series they should have won against Sri Lanka. Lost to New Zealand at rugby. Andy Murray disposed of early at Wimbledon. And last year's Tour de France winner Chris Froome crashing out of the Tour de France before it had really even started. Oh well, I suppose we cannot do brilliantly every year.

So what of the rest of the world? Well that has seemed very troublesome over the last few months. Trouble in Ukraine including the outrageous shooting down of MH 17. Trouble in Afghanistan. Trouble in Iraq. Trouble in Syria. Trouble in Gaza. And trouble with the rise of ISIS. None of this seems very good news. Nor did our Prime Minister have much good news out of Europe when he lost in his opposition to the appointment of Jean-Claude Junker as President of the European Commission. At least he had more control though when reshuffling his cabinet and, many would say "at last", populating it with more women in a clear

DAVID CAMERON CARRIED OUT A SEISMIC RESHUFFLE THAT SAW AN INCREASE IN THE NUMBER OF FEMALE MPS AROUND THE CABINET TABLE

strategy to seek to persuade the electorate that they should give the Conservatives another go when we get to the election in May 2015.

So what else has been happening? Well the economy still seems to be chuntering along vaguely in the right direction, although the indications of an interest rate rise get stronger, not helped by increasing inflation. Next there is talk of house price rises slowing down. Well I will only believe that in relation to London when there is very clear evidence to that effect. The search for missing airliner MH 390 also still goes on with it amazingly having been said that it may take as long as 10 years to find the 'plane.

And what have we got to look forward to for the rest of the year? Well there is the Commonwealth Games … in Scotland. And the Ryder Cup …. in Scotland. And, lest we forget, we are getting pretty close to the vote on Scottish independence. The latest polls show that the 'No' campaign are ahead. But who knows what will happen on the day? It is, after all, only a two horse race and one of the horses has a very enthusiastic jockey.

So what is in this issue of the Digest? Well, as I hope you can tell from the front cover, so far as concerns the offshore world, this issue has a Bermuda focus to it. We have Robin Mayor of Conyers, Kiernan Bell of Appleby and Andrew Martin of MJM on recent developments in Bermuda. But we also have Alex Potts of Sedgwick Chudleigh on what he sees as the type of disputes that the future holds for Bermuda.

Moving closer to home, we have Jeremy Goldring QC on a recent failed claim by a junior lender against its facility agent and Felicity Toube QC on without-prejudice privilege. Mark Arnold QC writes on a possible trump card for guarantors and Barry Isaacs QC on the likely consequences of the decisions in *Re Drax Holdings Ltd*, *Re Rodenstock GmbH* and *Re Apcoa Holdings GmbH*. We also have Richard Fisher on a recent decision in relation to the Cross-Border Insolvency Regulations and Henry Phillips on the Court of Appeal's recent decision in *Smithton v Naggar*.

In addition to all this William Willson reports on INSOL in Jersey in June 2014, and we introduce you to Robert Amey and Andrew Shaw who have successfully completed their pupillage and will become tenants at South Square with effect from 1 October 2014. We also have something new and different for you: a new regular feature by an accountant on issues which are of particular concern to them and, to start us off, we have Steve Akers of Grant Thornton UK LLP on litigation privilege and investigations by insolvency practitioners. And of course we have the usual case digests, this time edited by Lloyd Tamlyn as well as news in brief, diary dates and the South Square Challenge. But because it is summer we also have one final thing for you: a crossword set by Christopher Brougham QC of Spectator crossword fame. So there is quite a lot in this issue for you to enjoy over the summer.

YORKSHIRE'S GRAND DEPART WAS ONE OF BRITAIN'S FEW SPORTING SUCCESSES.

Finally, as always if you happen to find yourself reading someone else's copy of the Digest and wish to be added to the list, or if your contact details have changed, please send an email to kirstendent@southsquare.com and we will endeavour to make sure that you get the November issue of the Digest. In the meantime, all at South Square hope that you have a very good and, I am sure in every case, well-deserved summer break.

David Alexander QC

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‘Solely mechanical and administrative’ - *Torre* and the duties of a facility agent

JEREMY GOLDING QC examines a recent failed claim by a junior lender against its facility agent

By mid-2006, the market for commercial and industrial property was rising strongly and anticipated, by many, to rise further. Complex and highly-leveraged financing structures, based on the elevated valuations and expectations generated by the booming market, were commonplace, usually arranged by large banks. Often the senior lending in such structures was raised through a commercial mortgage backed securitization (“CMBS”), while the junior lending (sometimes known as “B” or “C” loans) was syndicated privately. But by early 2008, sentiment had changed. In August 2007, the interbank money markets, following concerns about the sub-prime residential mortgages in the United States, had seized up and would remain so until at least November 2008. The CMBS new issue market was generally closed and real estate and asset values were coming under pressure. By mid-2008, the worsening economic outlook engendered by the financial crisis meant that many who invested in transactions dating from the boom times were left with notes or “B” loans with little, if any, value. Since then many sophisticated investors, who lost money as their assets declined rapidly in value, have sought to recoup those losses by litigation (or the threat of litigation) against the large banks involved. But the task of identifying a claim is far from straightforward. The transactions were designed so that the risk of such losses generally lay with the investor rather than the bank that arranged the transaction. It is unsurprising that often the investor will find no peg on which to hang a viable claim, though that has not stopped several attempts.

A case recently tried by Mr Justice Sales in the Chancery Division, *Torre Asset Funding Ltd v. The Royal Bank of Scotland plc* [2013] EWHC 2670 (Ch), illustrates the difficulties facing an investor seeking to claim against the bank organising a structured transaction for the loss of value of its loan. The case involved a highly-leveraged structured financing of the Dunedin Group, a customer of the Royal Bank of Scotland (the “Bank”), which managed industrial property, entered into in October 2006. At the super senior level, there was a CMBS called Epic Industrious. Below that were several other tranches of lending, including two levels of mezzanine debt whose syndication was arranged by the Bank. The facility documents were substantially based on Loan Markets Association (“LMA”) standard forms. The Claimants, funds managed by Cambridge Place Investment Management, acquired the bulk of the Junior Mezzanine (or “B1”) Loan in early 2007. In the event, however, neither the market in industrial property, nor the Dunedin Group, performed as had been hoped. By mid-2008, the Claimants’ Junior Mezzanine Loan was significantly underwater and the Dunedin Group entered administrative receivership. The Claimants ultimately made no recovery from the Dunedin Group.

How, then, did the Claimants put their claim for this loss against the Bank? The Bank had arranged the syndication of the loan, but the Claimants did not allege that it had been mis-sold to them when they acquired it. There was no claim, for example, that there were any mis-representations in the syndication

JEREMY GOLDRING QC

information memorandum.[1] The Claimants' took a different tack. As was usual in structured financing transactions, following the issue of the notes and the syndication of the loans, the Bank undertook several ongoing roles including acting as Facility Agent for Lenders in respect of the B1 Loan that the Claimants had acquired.[2] It was this that the Claimants focused upon, alleging as its main case[3] that the Bank, as Facility Agent, had failed to comply with a duty to disclose certain negative information (the "Information"[4]) about the Dunedin Group in 2007, including the occurrence of an Event of Default. The Claimants asserted that if the Information had been disclosed to them, as it should have been, then they would have sold the B1 Loan before the decline in the market, and so have escaped some or all of the loss that they in fact suffered when the Dunedin Group collapsed.

As is set out in a detailed and comprehensive judgment (running to some 248 paragraphs), the Court rejected the claim on (amongst others) the following three grounds.[5] First, the Bank owed no duty to the Claimants as Facility Agent to disclose the Information. Secondly, applying the principles identified in *South Australian Asset Management v. York Montague* [1997] AC 191, in any event any loss suffered by the Claimants did not fall within the scope of any duty owed by the Bank. Thirdly, as a matter of fact, even if the Information had been disclosed to the Claimants by the Bank, it would not have caused them to sell the B1 Loan, so the Claimants could not prove causation. The first ground is of particular interest in showing the source and scope of a Facility Agent's obligations under an LMA-type facility agreement, and the risks to which such an agent is exposed. More generally, it illustrates the English Court's rigorous approach to identifying the obligations of sophisticated parties in complex and heavily-documented commercial transactions.

1/. Such claims are also difficult given (for example) the basis on which the arranging bank provides information to potential syndicated members: see, for example, the claim rejected by the Commercial Court (Christopher Clarke J) in Raiffesen Zentralbank Osterreich AG v Royal Bank of Scotland Plc [2010] EWHC 1392 (Comm) [2011] 1 Lloyd's Reports 123.

2/. The Bank's other roles included acting as Servicer in relation to the Super Senior lending; Senior Lender and Facility Agent in relation to the Senior lending; Facility Agent in relation to the mezzanine A lending; Junior Subordinated Mezzanine Lender and Facility Agent in relation to the mezzanine B2 lending; and provider of half of the loan note equity.

3/. The Claimants made a subsidiary claim for negligent misstatement based on statements made by the Bank in an e-mail to the Claimants in late 2007 and early 2008 in the course of the Bank seeking the Claimants' consent to an amendment to the Junior Subordinated Mezzanine Loan. The Court held that the Bank owed a duty of care, which it breached, but that the loss claimed was outside the scope of that duty: see [184] to [189]. A lesson is that, when seeking consent to amendments, banks should make clear on the face of their communications that no duty is assumed to the recipient.

4/. The Claimants relied on two pieces of information; an Event of Default found by the Court to have arisen out of negotiations between the Dunedin Group and Lender in summer 2007 (though unknown to the Bank at the time); and a Business Plan said to show that the Dunedin Group was in financial difficulty in 2007.

5/. The Claimants did not apply for permission to appeal.

A PERILOUS ASCENT FOR CLAIMANTS? (CERRO TORRE MASSIF IN PATAGONIA.)

The alleged duties of a Facility Agent at common law

The Claimants' case required them to show that the Bank, as their Facility Agent, was under a duty to disclose the Information to them. They relied on two alleged sources of such an obligation. Their first case was that their Facility Agent owed them "general duties at common law", including an obligation to provide "relevant information": see [142]. Given the detailed and comprehensive provisions of the contractual documentation setting out the role of the Facility Agent, this was an ambitious submission which the judge rejected. Having referred to a well-known passage in *Kelly v. Cooper* [1993] AC 205[6], the judge said (at [147]) "the common law does not stipulate a clearly defined set of obligations which attach to every agency relationship unless excluded by agreement." He continued:

"Where the parties have entered into detailed commercial agreements of the type at issue here, it is not plausible to suppose that they intended that some potential additional set of vague and unspecific duties might apply over and above those specified in the agreements themselves."

Duties of Facility Agent under an LMA-type facility agreement

The correct approach, therefore, was to determine the scope and content of the Facility Agent's duties by interpreting the contractual documentation in accordance with well-established principles. The Claimants' second case was that, properly construed, the relevant contract imposed an implied obligation on the Bank as Facility Agent to pass the Information to them, an argument that the judge also rejected. Having set out the principles of contractual interpretation (including in relation to the implication of terms)[7], the judge applied them by subjecting the contractual provisions to searching examination in order to determine whether the Bank had agreed to supply the Information to lenders in the position of the Claimants, concluding that they had not.

The judge's starting point was to identify two general features of the Facility Agent's role relevant to the specific questions with which he was concerned (at [34] to [39]):

1) *"Solely mechanical and*

6/. Lord Browne-Wilkinson referred to two fundamental propositions: "first, agency is a contract made between principal and agent; second, like every other contract, the rights and duties of the principal and agent are dependent upon the terms of the contract between them, whether express or implied. It is not possible to say that all agents owe the same duties to their principals: it is always necessary to have regard to the express or implied terms of the contract." (at 213H-214A)

7/. There is a useful summary of the applicable approach to construction in the 13 propositions set out by the judge at [152].

administrative": the facility agreement (like the LMA standard form) included a provision (clause 26.2(e)) stating that the "duties of the Agent under the Finance Documents are solely mechanical and administrative in nature". At the same time, the agreement included specific provisions imposing duties or conferring discretions on the Agent. Clause 26.2(e) has "to be read subject to the specific provisions in the relevant agreements which impose duties or confer discretions on the Agent"; it "mandates a reading of the finance agreements which minimises so far as is possible, consistently with the express language and practical workability of the agreements and the arrangements to which they are intended to give effect, the substantive content of the duties on the Agent."[8]

2) *"In good faith, without capriciousness and rationally*": where the Facility Agent was granted discretionary powers under the documents, it was under an implied duty to exercise that discretion in accordance with the principles stated by the Court of Appeal in *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116; [2008] Bus LR 1304 ("Socimer") at [60]-[66], that is "in good faith, without capriciousness and rationally".[9] In the judge's words: "I would add that the relevant standard of what would qualify as arbitrary, capricious, perverse or irrational will be conditioned by the scheme of the contract in which the relevant contractual discretion arises and the commercial purposes intended to be served by that contract. In the context of the [facility agreement], a (if not the) principal role of the Agent is to facilitate the B1 Lenders in the exercise of their rights and powers under the facility agreement], and what it would be rational or irrational for the Agent to do has to be judged in the light of that."

With that framework, the judge analysed the implied terms in the facility agreement alleged by the Claimants (at [153] to [157]).[10] The Claimants had not relied on breach of a *Socimer*-type duty, which could only be breached by arbitrary, capricious, perverse or irrational behaviour by the Bank. Likewise, there was no allegation that the Bank had acted other than in good faith, without capriciousness and rationally. Rather, the Claimants relied upon a more stringent duty that would be breached by a mere failure to pass on the Information. The judge (perhaps unsurprisingly) held that there was no scope for the implication of such a rigorous term. It was unnecessary given the Bank's *Socimer*-type duty, as well as uncertain in scope, and would conflict with the terms of the facility agreement by imposing an absolute obligation to pass on information rather than the discretion expressly provided for in the agreement.[11] It would cut across the carefully drafted contractual code to which all parties had agreed at the outset of the transaction.

Conclusion

It is easy for even a sophisticated investor, which has lost its money, to convince itself after the event that information that it did not receive at the time would have made all the difference, allowing it to escape a ship that later sank. The impressive judgment in *Torre* illustrates some of the reasons why such cases are often difficult to prove. Wide-ranging duties to disclose material information are the exception in English commercial law and will not readily be implied into a detailed contractual framework. Any assertion of such a duty will be the subject of rigorous scrutiny. The documentation will no doubt include exculpatory provisions. Even if such a duty (and its breach) could be proved, a claimant must also show that the information would, on balance, have made all the difference to the relevant decision-maker's view of the investment. It is easy to make such allegations with the benefit of hindsight, much more difficult to produce compelling evidence in support. Even if the factual hurdle is overcome, it will also be necessary to demonstrate the loss is within the scope of the defendant's duty, rather than being a result of external market movements, and which would have been suffered by the claimant even if the information in fact provided had been true. The message for claimants is that it is essential to identify at the outset of proceedings not only a breach of obligation by the defendant, but also a factual link to legally-relevant loss. The (unsurprising) message for defendant banks is that, in litigation of this type, the terms of the relevant documentation are likely to be crucial. Properly and carefully drafted provisions should go a long way to protecting a bank against many such claims.

Jeremy Goldring QC acted for the defendant bank in Torre

8/. See [34].

9/. See para [155] of the judgment. At [66] of Socimer, Rix LJ said: "It is plain from these authorities that a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to Wednesbury unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria …"

10/. In addition the Claimants sought to rely on a provision in the Intercreditor Deed. This was also rejected by the judge: see [158] to [172]. Save in demonstrating again the rigorous approach of the English court to issues of contractual duty, this is of less general interest turning, as it does, on the specific words of the Intercreditor Deed, which does not appear to have been in a standard form.

11/. The facility agreement provided: "The Agent may disclose to any other Party any information it reasonably believes it has received as agent under this Agreement."

Ipso Facto Problematic: Pan Ocean and the Model Law

Richard Fisher looks at the decision in Fibria Celulose S/A v Pan Ocean Co Ltd and the different approaches taken in England on the one hand and the US and Canada on the other

Lord Hoffmann's golden thread of modified universalism looks increasingly tatty post-Rubin. Those searching for alternatives by way of creative applications of the UNCITRAL Model Law (as implemented in England and Wales through the Insolvency (Cross Border) Regulations 2006 ("CBIR")) are likely to be disappointed by the decision of Morgan J in *Fibria Celulose S/A v Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch), which decision illustrates an increasingly clear difference in approach between judges in England and those in the US/Canada as to the nature of relief which may be available to officeholders pursuant to Article 21 of the Model Law.

Let us consider, once again, an *ipso facto* clause in a contract (i.e. a clause which allows a party to a contract to terminate the contract by reason of the insolvency of the counterparty). In certain jurisdictions in the United States, such clauses are automatically invalid. In England, by contrast, such clauses are valid assuming that they do not do also seek to deprive the debtor of vested rights of value such as to infringe the anti-deprivation principle (*Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2012] AC 383).

Company A contracts with Company B by way of an English law governed agreement containing an *ipso facto* clause. Company A is a Korean company. Company B is a Brazilian company. Company A enters insolvency proceedings in Korea (being main proceedings for the purpose of the Cross-Border Regulations). Let us assume that under Korean law, *ipso facto* clauses are inoperative or invalid during the course of the insolvency proceedings. Company B seeks to exercise its contractual right to terminate the English law governed contract. Can it be prevented from doing so by way of an application under the CBIR by Company A's Korean administrator?

This, in a simplified form, is the issue that arose before Morgan J in the Pan Ocean case. In determining the applications before him, he was required to consider (i) whether the power under Article 21.1(a) of the Model Law (to grant a stay on the "*commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities*") enabled the Court to restrain Company B from serving a notice of termination; and (ii) whether, by virtue of the use of the phrase "*any appropriate relief*" in Article 21, the Court was in any event empowered to make an order restraining Company B from serving such a notice.

Morgan J rejected both arguments. As to the first, he concluded that the service of a notice to terminate could not be considered to be the

commencement or continuation of an individual action or proceeding within Article 21.1(a). In this regard, he was persuaded to follow the line adopted (for the purpose of moratoriums arising in administrative) in *Bristol Airport Plc v Powdrill* [1990] Ch 744 and *Re Olympia & York Canary Wharf Ltd* [1993] BCC 154. Whilst unsurprising from the perspective of an English lawyer, it is notable that this approach appears to differ from that adopted in Canada at least, where the analogous legislation has been interpreted as using the phrase "*proceedings*" in a manner that could extend to extra-judicial conduct. Nonetheless, having been referred to the decisions in this regard, Morgan J indicated

Fibria v Pan Ocean seems to have brought to an end any hope of using the Model Law in England to apply… the substantive provisions of foreign law …

RICHARD FISHER

(paras 74 and 75) that he found "*the ordinary and well understood meaning of the phrase "the commencement or continuation of individual actions or individual proceedings""* to be one which did not extend to the service of a notice to terminate, and concluded that Article 21.1(a) should not be construed any more extensively than this.

The second aspect of Morgan J's decision may be of wider importance. Article 21.1 provides in its opening lines "*Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including ….*". The administrator of Pan-Ocean argued that, notwithstanding the position under English law, the Court could restrain Company B from relying on the *ipso facto* clause. This, it was said, amounted to any appropriate relief, which relief was justified in all the circumstances. In effect, the Court was said to be empowered to achieve a result equivalent to applying the provisions of a foreign law notwithstanding the non-availability of relief under English law.

Morgan J rejected this argument and, in so doing, appears to have brought to an end for the time being any hope of using the Model Law in England to apply (or achieve a result equivalent to applying) the substantive provisions of foreign law. It would appear that he was particularly concerned as to the lack of limitation imposed on the power in Article 21.1 if the administrator was correct:

"*whilst some of these examples are more fanciful than others, they do indicate that the administrator's submissions result in the English court having the widest possible power to do whatever it thinks fit, whether its order is in accordance with the law of the foreign insolvency proceedings or not.*" (§79)

Furthermore, the learned judge's

THOSE SEARCHING FOR CREATIVE APPLICATIONS OF THE UNCITRAL MODEL LAW ARE LIKELY TO BE DISAPPOINTED BY THE DECISION IN FIBRIA CELULOSE S/A V PAN OCEAN CO LTD

interpretation of the various working group reports leading up to the final text of the Model Law was that "*it seems improbable that the working group, having deleted (from what is now article 21.1(g)) a power for the recognising court to apply the law of the foreign proceeding, intended to bring back in such a power under the general wording which refers to 'any appropriate relief'*." (§87)

Fortified by the comments of Lord Collins in *Rubin v Eurofinance SA* [2013] 1 AC 236 at 141 which did not appear to disprove of the submission made in that case that Article 21 permitted the grant of any type of relief which is available under the law of the enacting state, and at least comforted by the comments made by the authors of various textbooks (including this writer) that the application of foreign law was difficult and unlikely to have been intended, Morgan J concluded that it was not possible to grant the relief sought by the administrator. In so doing, he considered a series of US and Canadian cases in which the opposite conclusion had been reached. He rejected the approach adopted (in particular that of the US Court of Appeals (5th Circuit) in *Re Condor Insurance Co Ltd* 601 F 3d 319 (2010)) for two reasons (see §106):

"The first is that, with respect to the judges in that case, I do not think that their description of the various reports of the working group on

Fortified by the comments of Lord Collins in Rubin… Morgan J concluded that it was not possible to grant the relief sought by the administrator…

the Model Law was accurate. Secondly, their reasoning relied on the position which pertained under section 304 of the former US Bankruptcy Code before the implementation of the Model Law. I can see that if the position under section 304 of the former Code was that the US court could grant "any appropriate relief" and that it had been established that those words allowed the US court to apply the law of the foreign proceedings, then the same words should have the same effect in section 1521 of the Bankruptcy Code , which implemented the Model Law. However, there is no comparable legislative history in Great Britain and it is open to me to conclude that the United States have implemented the Model Law in a way which is not identical to the way in which it has been implemented in Great Britain."

Thus we appear to be moving to a position where there is a clear difference in approach between the judges in England and the US/Canada regarding the scope and nature of the relief available under Article 21. In light of the direction in Regulation 8 of the CBIR to seek to achieve a uniform application of the Model Law, this is disappointing. But it may be unsurprising: the circumstances in which *Re Condor* was decided, and in particular the implementing background to and content of Chapter 15, are different to the CBIR. As observed in Sheldon, Cross Border Insolvency (3rd Edition) at §3.99, there was a need to apply a foreign law in Condor in order to fill an apparent lacuna in an efficient manner. That was not the issue facing Morgan J and the working group papers from Uncitral itself do not support the argument that Article 21 should be construed so as to enable foreign law to be applied (or to achieve a result equivalent to the application of foreign law).

If it was hoped that the problems faced by modified universalism might be ameliorated under the CBIR, it seems disappointment lies ahead…

Whether, in practice, the apparent difficulties can be avoided in a multi-national insolvency by seeking relief in other jurisdictions to which the creditor is amenable, and relief is more far ranging, remains to be seen. But it will, as always, end up being more costly. If it was hoped that the problems faced by modified universalism at common law might be ameliorated by a more flexible approach under the CBIR, it seems that disappointment lies ahead.

Morgan J has granted permission to appeal.

THERE IS AN INCREASINGLY CLEAR DIFFERENCE IN APPROACH BETWEEN JUDGES IN ENGLAND AND THOSE IN THE US/CANADA AS TO THE NATURE OF RELIEF AVAILABLE TO OFFICEHOLDERS UNDER ARTICLE 21 OF THE MODEL LAW

Case Digests

In *Fibria Celulose v Pan Ocean* (see under *Corporate Insolvency*, below), the world's largest producer of wood pulp was in Court defending its right to terminate a contract on the grounds of its Korean counterparty's insolvency.

The contract was governed by English law. Nonetheless, the administrator of the Korean company sought an order restraining the producer from relying on the termination clause on the basis that the clause was alleged to be void and unenforceable under Korean law. The relief was sought under Article 21 of the Cross-Border Insolvency Regulations, which allowed the English Court to grant "*any appropriate relief*", including, the administrator argued, relief available under foreign systems of law.

Mr Justice Morgan refused the administrator's application, holding that "*any appropriate relief*" was limited to relief available in the domestic insolvency. If "*any appropriate relief*" meant what it said, the Judge reasoned, then the English Court had power to grant any relief, under any system of law anywhere, or even relief which did not exist under any system of law anywhere. Mr Justice Morgan was further guided by his own researches into the reports of the working group on the Model Law. Elsewhere, Cordelia would have approved as Mr Justice Simon refused to apply the principle of "*ex nihilo nihil fit*" in deciding that Russian arbitration awards, which had been annulled by the Russian courts, might nonetheless be enforced in England if the annulment decisions were not recognised on public policy grounds (*Yukos Capital v OJSC Oil*, *Commercial Cases*, below).

LLOYD TAMLYN

BANKING AND FINANCIAL SERVICES

Digested by WILLIAM WILLSON


DAVID ALLISON QC

Napier Park European Credit Opportunities Fund Ltd v Harbourmaster Pro-Rata Clo 2 BV & Ors [2014] EWCA Civ 984 CA (Civ Div) (Longmore, Lewison, Floyd, LLJ), 11 July 2014

Contract - Noteholder dispute - Construction

The appellant junior noteholder ("A") appealed against a decision that a substantial sum of money representing unscheduled principal proceeds ("UPP") was not available for reinvestment as it did not meet the reinvestment criteria specified in a collateral management agreement ("CMA"). The first respondent issuer ("R") issued 14 classes of notes which were secured on the proceeds of an underlying portfolio of loans originally owned by R under a CLO structure. A dispute arose between the noteholders over whether the UPP was available to be reinvested or should be paid out to noteholders. Under the reinvestment criterion 4 (i) in the CMA, the UPP could only be reinvested if the ratings of the senior notes "have not been downgraded below their initial ratings". The senior notes were downgraded in 2010 and were then upgraded in 2012. The UPP were not reinvested in 2014 on the basis that the reinvestment criteria had not been met. Held that an iterative process of interpretation was not confined to textual analysis and comparison: it extended to placing the rival interpretations of a phrase within their commercial setting and investigating their commercial consequences (*Re Sigma Finance* [2009] UKSC 2). The court should seek to discern the commercial intention and the commercial consequences from the terms of the contract itself, and that fed in to the process of deciding whether a particular word or phrase was in reality clear and unambiguous. The language of criterion 4 (i) was open to question. The disputed phrase was capable of referring to something which was continuing. The judge correctly said that the tense was present perfect but he took too narrow a view of the possible usages of that construction. The instant court disagreed with the judge that, in ordinary usage, the phrase could only refer to a past historic event at some indefinite point. It was important to consider the overall structure of the transaction. **[David Allison QC]**


HENRY PHILLIPS

Landesbank Hessen-Thuringen Girozentrale & Ors v Bayerische Landesbank (London) & Ors [2014] EWHC 1404 (Comm) (Flaux J), 8 May 2014

Contract - Construction of Facility Agreement

The court was required to construe a facility agreement under which the claimants ("C") and defendants ("D") were lenders in relation to the financing of a joint venture for the purchase of real property by the non-party borrowers ("B"). Under the agreement prior to syndication, the first defendant ("BLB") acted in several capacities: as facility agent, as security agent and as the sole original lender. Post-syndication, BLB was also recognised as the hedging lender, although not as a separate party to the agreement. The court was required to determine the manner in which BLB, as facility agent, would be required to distribute among the "finance parties", any sum that B might pay pursuant to their obligations under the associated hedging agreements where it was likely that those sums would be less than the amount B was liable to pay. In those circumstances, the distribution of monies was to be distributed according to clause 9.7, which provided for the payment to be made "first, to any unpaid fees and reimbursement of unpaid expenses or costs (including break costs and hedging break costs) of the Facility Agent" and in any other case, "pro rata to the outstanding amounts owing to the relevant Finance Parties under the Finance Documents taking into account any applications under this clause 9.7". Held that clause 9.7 (a) was concerned with giving priority to the reimbursement of the fees, expenses and costs which the facility agent had incurred in carrying out its role as an agent of the lenders and it made perfect commercial sense that the agent should recover its fees, expenses and costs in priority to the other lenders, without having to pro-rate them because it has acted as their agent and they have undertaken to indemnify it under the facility agreement. The court rejected BLB's construction of the reference to facility agent as shorthand for BLB in all of its capacities. There was no compelling reason for giving priority

to BLB for having taken commercial risks as hedging lender when all the lenders were taking a much more substantial risk by making the loan. Accordingly, clause 9.7 (a) had a clear meaning and effect, giving priority to the fees, costs and expenses incurred by BLB in its capacity of facility agent as such, but not in respect of break costs or hedging break costs it only incurred as hedging lender.
[Mark Phillips QC, Henry Phillips]

Kays Hotels Ltd v Barclays Bank Plc [2014] EWHC 1927 (Comm) (Hamblen J), 16 May 2014

Limitation – Section 14A Limitation Act 1980 – test for knowledge

The applicant bank ("A") applied for summary judgment or to strike out the claim against it on the ground that the claim was statute-barred. The respondent ("R") was a company which ran a country house hotel. It was a family-owned company and a father and son were the directors. In 2005 A had entered into a loan agreement with R to borrow £1.34 million repayable over 20 years. R's case was that it was given the impression that there would be no drawdown under the loan until a protective hedge had been put in place. Before the end of 2005 the parties entered into an interest rate hedging product in the form of a collar that lasted for 10 years. The effect of the product was that if interest rates remained between 4 and 5.5 per cent, as they did from 2005 to 2007, neither side paid. If interest rates rose above 5.5 per cent, as they did in 2007, B made payments to K. Rates then fell again and no payments were made. In 2008, when rates fell below 4 per cent, K started making payments to A. R issued proceedings in November 2012 alleging that the product had been missold. A applied to strike out the claim as statute-barred. R relied on the Limitation Act 1980 section 14A on the basis that it had not had the requisite knowledge to bring an action before November 2009. A contended that R knew or should have known that it had a claim before proceedings were issued since by that date it had made payments totalling £36,000. Held that the test for knowledge was whether the claimant had been alerted to the factual rudiments of his claim, sufficient for him to take advice and put proceedings in train. What he had to know to set time running was the essence of the act or omission to which his damage was attributable. Where a claimant acted on professional advice he must have had some reason to question the advice and to think that something must have gone wrong with it. The determinative moment was when he had reason to begin to investigate *(Broadley v Guy Clapham* [1994] 4 All ER 439). A's approach to the requisite knowledge was too narrow. R had a real prospect of establishing that it could rely on section 14A and its claim could not be summarily dismissed as bound to fail on limitation grounds. Furthermore, the issue of constructive knowledge was particularly fact-dependent and required a full consideration of all the circumstances of the person whose knowledge was in issue.

Fairfield Sentry Limited (in liquidation) v Migani & Ors [2014] UKPC 9 PC (BVI) (Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption, Lord Toulson), 16 April 2014

Feeder Fund – meaning of "certificate"

The appellant financial institutions ("A") appealed against a decision as to whether certain documents were binding on the respondent company ("R"). R was a BVI-incorporated feeder fund that invested in into the Madoff Ponzi scheme. Investors participated by subscribing for shares in the fund at a price dependent on the fund's net asset value per share ("NAV"); they were entitled to withdraw funds by redeeming their shares under the provisions of the fund's articles. The aim of the claim was to recover from A the amounts paid out to them on redemption, on the basis that they were paid out in the mistaken belief that the assets were as stated by R, when there were in fact no such assets. The High Court ordered to be determined as a preliminary issue the question of whether certain transaction documents issued to members of the fund recording the NAV per share or the redemption price upon redemption were binding on the fund. Held that as a matter of language, a "certificate" ordinarily meant (a) a statement in writing, (b) issued by an authoritative source, which (c) was communicated by whatever method to a recipient or class of recipients intended to rely on it, and (d) conveyed information, (e) in a form or context which showed that it was intended to be definitive. The monthly email, the contract notes and the monthly statement of account were all "certificates".

CIVIL PROCEDURE

Digested by ALEXANDER RIDDIFORD


ALEXANDER RIDDIFORD

Denton v TH White Ltd [2014] EWCA Civ 906 (Master of the Rolls, Jackson and Vos LJJ), 4 July 2014

Case management – delay – professional conduct

The Court of Appeal further explained the guidance given in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 regarding the proper approach to be taken by the Court to the issue of relief from sanctions pursuant to CPR rule 3.9. This was a conjoined appeal from three decisions in which the respective Judges at first instance had purported to apply the Mitchell guidance but, across the three decisions, the parties had been treated inconsistently. In particular the Court of Appeal was called upon to examine criticisms which had been levelled at the Mitchell guidance, specifically: (i) it includes a "triviality" test which amounts to an "exceptionality" test where the latter had been rejected by the Jackson Report; (ii) it considers factors (a) and (b) in CPR rule 3.9(1) as "paramount considerations" and downplays the requirement for the Court to consider all the circumstances of the case; and (iii) it causes disproportionate penalties to be imposed for breaches which had little practical effect on litigation.
The appeals were allowed, with Jackson LJ concurring in the result but partly dissenting in the reasoning. CPR rule 3.9(1) contains three elements: (i) identification of the "failure to comply"; (ii) consideration of factor (a); and (iii) consideration of factor (b). It was held that the guidance given in paragraphs [40] and [41] of the Court of Appeal's Mitchell decision remained substantially sound, but required further clarification. In particular, some first instance Judges had failed to consider all the circumstances of a case, whilst others had adopted a more traditional approach of giving pre-eminence to the need to decide claims on their merits (when there was no room for such an approach in the post-Jackson Report era).
Accordingly, in future Judges are to adopt a three-stage approach: (i) they had to identify and assess the seriousness or significance of the relevant failure (there are degrees of seriousness and significance and "triviality" is not part of this stage of the approach); (b) the second stage did not derive from r.3.9 but was nevertheless important: the court had to consider why the failure or default occurred; (c) the third stage required the court to consider all the circumstances of the case.

Power v Meloy Whittle Robinson Solicitors [2014] EWCA Civ 898 (Tomlinson, Briggs and Vos LJJ), 2 July 2014

Claim forms – service by alternative permitted method

C appealed against a decision that there was no valid service of a claim form on D. The substantive dispute was a solicitors' negligence claim. At first instance it had been held that there was no good reason to authorize service by another method under CPR rule 6.15 because (i) there had never been any difficulty about effecting service and D had not been evasive; (ii) where parties agreed to serve solicitor to solicitor it was wrong to go behind that agreement; and (iii) it was wrong to allow a claimant to sidestep any rigours by reliance upon CPR rule 6.15. The Court of Appeal overturned the decision at first instance. In light of the guidance set down in *Abela v Baadarani* [2013] UKSC 44 (and applying that decision), it was held that the relevant focus should be on why the claim form could not have been served in the ordinary way during the period of its validity for service and whether the steps already taken to bring the claim form to D's attention constituted good service.

American Leisure Group Ltd v Garrard [2014] EWHC 2101 (Ch) (David Richards J), 26 June 2014

Claim forms – extensions of time – service by alternative permitted method

D applied for a declaration that the purported service of the claim form was not valid and for an order dismissing the proceedings against him on the basis that: (a) the claim form could not have been served at the D's Switzerland address as he had not lived there for three years; (b) service of the claim form was therefore governed by CPR rule 7.5(1); (c) the claim form was purported to be served on the D's solicitors within the jurisdiction outside the four month period allowed by CPR rule 7.5(1); (d) therefore, the claim form was not validly served. C argued that service on the facts of the case was governed by CPR rule 7.5(2), i.e. "service out of the jurisdiction", and therefore could be validly effected within 6 months of the date of issue. This, argued C, was achieved by serving the claim form on D's solicitors. In summary, the time for service was 6 months provided the claim form was one which was to be served out of the jurisdiction, whether such service was in the event within or out of the jurisdiction. C also sought to rely on CPR rule 6.40(3)(c), which permits service "by any other method permitted by the law of the country in which it is to be served".

The Judge granted D's application on the basis that CPR rule 7.5(2) "is not concerned with, and does not permit, service of a claim form within the jurisdiction". As to CPR rule 6.40(3)(c), C could not rely on this provision since it contains general provisions about the method of service of a claim form or other document on a party out of the jurisdiction only.

Newland Shipping and Forwarding Ltd v Toba Trading FZC [2014] EWHC 1986 (Comm) (Males J), 18 June 2014

Relief from sanctions – applications under CPR rule 13.3

D applied to set aside a default judgment for US$6,605,673. It was conceded that the application had to be heard under CPR rule 13.3 and that D had to show that they had a real prospect of successfully defending the claim and the Court had to have regard to whether the application had been made promptly. An application under CPR rule 13.3 is an application for relief from sanctions (see *Samara v MBI & Partners UK Ltd* [2014] EWHC 563 (QB)). Accordingly, the guidance given as to CPR rule 3.9 (relief from sanctions) in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 applied to an application under CPR rule 13.3. The Judge found that D's failure to acknowledge service was a deliberate decision, that his failure was not "trivial", and that there was no good reason for it. Further, the application to have judgment set aside was not made promptly. However the sanction in play was an extreme one (the default judgment against D related to allegations of dishonesty against D), and if the relief were granted the trial date would not be lost and a fair trial could be had without significant extra cost. For these reasons (amongst others), justice was best served not by dismissing the application, but by making a conditional order to set aside the default judgment. Note that, in light of the Court of Appeal's decision in *Denton v TH White Ltd* [2014] EWCA Civ 906 (digested above), it is doubtful that Males J's reference to triviality still reflects the current state of the law.

COMMERCIAL LITIGATION & ARBITRATION

Digested by CHARLOTTE COOKE


CHARLOTTE COOKE

Yukos Capital SarL v OJSC Oil Co Rosneft [2014] EWHC 2188 (Comm) (Simon J), 3 July 2014

Arbitration – Enforcement

The Court determined that there was no principle of ex nihilo nil fit in English law preventing the Court giving effect to arbitration awards granted by the International Commercial Arbitration Court in Russia, desire their having been set aside by the Moscow Arbitrazh Court. It would be contrary to principle if the Court was bound to recognise a decision of a foreign court that offended against principles of natural justice and public policy. The Court further held that interest on the award could not, as a matter of Russian law, be recovered under the Russian Civil Code, but that interest on the sums claims could be recovered under section 35 of the Senior Courts Act 1981 as a matter of principle, though it was a matter for the Court's discretion in any particular case.

Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd [2014] EWHC 2104 (Comm) (Teare J), 1 July 2014

Arbitration clauses – Condition precedent

On an application for an order than an arbitral tribunal lacked jurisdiction, it was held that a clause in a contract which provided that the parties must seek to resolve a dispute by friendly discussions in good faith and within a limited period of time before the dispute could be referred to arbitration was held to be enforceable as it was not incomplete, or uncertain. An obligation to seek to resolve a dispute by friendly discussions in good faith had an identifiable standard: fair, honest and genuine discussions aimed at resolving a dispute. It was further held that friendly discussions in good faith with a view to resolving the dispute had taken place and that the condition precedent to arbitration had been satisfied such that the arbitral tribunal did have jurisdiction.

Federal Mogul Asbestos Personal Injury Trust v Federal-Mogul Ltd [2014] EWHC 2002 (Comm) (Eder J), 27 June 2014


RICHARD FISHER

Contract – Reinsurance – Asbestos

T&N (the First Defendant) had been heavily involved in the manufacture and distribution of asbestos. The Claimant ("the Trust") was established when T&N went into insolvency proceedings, in order to provide a fund for the payment of claims. The Second Defendant was T&N's insurer under an asbestos liability policy and the Third to Fifth Defendants were reinsurers, to whom the insurer had ceded its liabilities under that policy.
The Policy obliged T&N to handle claims in a "business-like" manner, specifying a standard taking into account best practice. After an insolvency event, the insurer was given control over the disposition of claims, also being required to act in a business-like manner. The Trust argued sought declarations as to the obligations of the insurer and reinsurers in relation to claims handling. It was held that the Trust had no standing to seek declarations as to the claims handling obligations of the insurer and reinsurers. The Trust was not a party to the relevant contracts and it was not sufficient that the Trust was directly affected by the declarations sought, particularly given there was no dispute between the contracting parties themselves. Further, even if the Trust had standing, the declarations as to the claims handling obligations of the insurer and reinsurers would not have been granted. It was not necessarily un-business-like for the reinsurers to refuse to accept the Trust's "trust distribution procedures" for the purposes of claims handling. The Trust was, however, entitled to declarations as to the methodology used by the Trust in relation to specific actions.
[Richard Fisher]

BMIC Ltd v Sivasankaran [2014] EWHC 1880 (Comm) (Popplewell J), 12 June 2014

Contract – Promissory Estoppel

The Court held that a company (A) was unable to found a promissory estoppel on statements said to have been made by representatives of another company (B) during negotiations to settle a dispute. Nothing in the statements meant that the legal obligations of the parties would be other than those set out in the written agreement; no assurance that had been given at the meeting had been intended to be legally binding. It was further held that, in any event, the make of the statements had no authority to bind Company B and that Company A knew that the written agreements could only be executed on the express authority of Company B's board.

Diag Human SE v Czech Republic [2014] EWHC 1639 (Comm) (Eder J), 22 May 2014

Arbitration Awards – Issue Estoppel

The Claimant sought to enforce an arbitration award against the Czech Republic under section 103 of the Arbitration Act 1996. As the Czech Republic was a party to the New York Convention 1958, the award was a New York Convention Award within the meaning of section 100 of the Act and section 103 of the Act therefore applied. The Czech Republic argued that the question of whether the arbitration award was binding had already been decided by the Supreme Court of Austria such that there was an issue estoppel between the parties. The Claimant submitted that no issue estoppel arose as the Supreme Court of Austria had determined a different issue. It was held that where a foreign court has decided that an award is not binding, there was no reason in principle why that decision should not give rise to an issue estoppel between the parties, provided that the issue determined was the same and the Supreme Court of Austria had determined that the award was not binding. Although the decision of the Supreme Court of Austria had been made in enforcement proceedings brought under the New York Convention, which was directly enforceable in Austria, with the English proceedings being brought under section 103 of the Arbitration Act 1996, that was irrelevant as the purpose of that section was to give effect to the New York Convention. Therefore there was an issue estoppel between the parties.

COMPANY LAW

Digested by **GEORGINA PETERS**


MICHAEL CRYSTAL QC


GEORGINA PETERS

Smithton Limited (formerly Hobart Capital Markets Limited) v Guy Naggar [2014] EWCA Civ 939 (Arden LJ, Elias LJ, Tomlinson LJ), 10 July 2014

De facto directors – Shadow directors – Contracts for difference – Companies Act 2006, section 190

The Claimant ("Hobart") appealed in respect of its claim for loss incurred in consequence of certain transactions, being contracts for difference ("CfDs"), entered into between Hobart and clients introduced to Hobart by the Defendant, Guy Naggar. The clients in question were two companies owned and controlled by Mr Naggar and his family, and were thus persons connected with Mr Naggar for the purpose of the Companies Act 2006, s 190. The claim was not brought against those companies (which are insolvent), but against Mr. Naggar in his personal capacity. Mr Naggar was a director and chairman of Dawnay Day International Limited ("DDIL"), itself the majority shareholder of Hobart. The Judge at first instance dismissed each ground of Hobart's claim. Hobart appealed against the Judge's decisions on the first two grounds. The first ground was a claim that Mr Naggar was a de facto or shadow director of Hobart and had breached duties he owed to Hobart. The Judge held that identification of the hat which Mr Naggar was wearing in his dealings with Hobart was crucial in determining whether he was a de facto or shadow director. She found, on the facts, that Mr Naggar was not a de facto or shadow director; nothing she had seen went beyond the involvement one would expect to see from a person who combined the roles of the representative of Hobart's major investors and chairman of the majority shareholder (being DDIL).
The Court of Appeal, applying the Supreme Court decision in *HMRC v Holland* [2010] 1 WLR 2793, dismissed the appeal against those findings. In particular, the Court rejected the submission that the Judge made an error of principle in proceeding on the basis that, if a person could possibly have acted wearing some other hat than that of director, his acts should be attributed to the role represented by that hat. The Judge had been correct to find that in light of a joint venture agreement ("JVA"), providing for the appointment of Hobart's directors and making certain provisions as to management, as well as the need for Hobart's directors to be authorised by the FSA, it was unlikely that Hobart would have permitted Mr Naggar to act as a de facto director. The Judge was entitled to take the view that parties to the JVA not appointed as directors, would not take on that role and would act within the roles to which they had been lawfully appointed. In the absence of other factors (which were

not, on the facts, made out), the likelihood was that Mr Naggar would not act as a director. Hobart's various challenges to the Judge's fact-finding, and the weight attributed to certain facts, also failed.

The second ground was a claim that Mr Naggar's conduct constituted a breach of the Companies Act, s 190, which prohibits arrangements under which certain persons (in this case a director of a holding company) acquire a substantial non-cash asset from the company or vice versa. The Judge held, having heard expert evidence on the point, that the mechanism for creating the CfDs does not constitute an arrangement under which Mr Naggar acquired an asset from Hobart or under which Hobart acquired an asset from him. As to Hobart's further argument that the overall arrangement under which Hobart opened the CfDs was an arrangement under which Mr Naggar or his connected companies would ultimately acquire shares, the Judge accepted that s 190(1) requires a high degree of certainty at inception of the arrangement that the asset will be acquired. The most that could be said on the facts was that the overall arrangements entered into were arrangements under which Mr Naggar or his companies might at some future point acquire shares, which was not enough. The Court of Appeal also dismissed the appeal in respect of this ground, upholding the Judge's findings in relation to each of Hobart's s 190 arguments.

[Michael Crystal QC, David Alexander QC, Tom Smith QC]

(1) Energenics Holdings Pte Ltd (a company registered in the Republic of Singapore) (2) Neuftec Ltd (a company registered in the Commonwealth of Dominica) v Ronendra Nath Hazarika [2014] EWHC 1845 (Ch) (Judge Pelling QC), 13 June 2014

Company Law – Share sale agreement – Breach of contract – Reflective loss – Nominal damages – De facto directors

A purchaser under a share sale agreement was held entitled to nominal damages only, in respect of a company shareholder's breach of the agreement (failure to transfer shares in A Ltd). The claimant company, C Ltd, had been incorporated for the purpose of exploiting a diesel fuel additive product, in respect of which a licence had already been acquired by E Ltd, but was subsequently terminated for failure to pay royalties. A Ltd held the intellectual property rights for the product. C Ltd claimed damages for loss of the economic value of exploiting the product, on the ground that until the shares were transferred it had been unable to grant a licence to E Ltd to sell the product. E Ltd had had to supply customers with a different additive at a reduced margin and incurred increased storage costs.

Although the defendant was in breach of contract for failing to transfer his shares in A Ltd, C Ltd was held to have failed to establish any loss. C Ltd should have pleaded that its claim was being advanced by reference to losses allegedly suffered by E Ltd, which were the losses claimed by C Ltd. The Judge further found the evidence adduced in support of that claim to be deficient. C Ltd had failed to prove the existence of an embargo against the sale of the product imposed because of the absence of a licence. C Ltd also failed to show that its reflective loss claim was foreseeable, as it had not been contemplated at the time of the share sale agreement that it would ever own E Ltd (that came about as a result of a separate and subsequent settlement agreement). The Judge applied the general rule that a shareholder cannot recover reflected loss, cf. *Johnson v Gore Wood & Co (No. 1)* [2002] 2 AC 1. The possible exception identified in *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 where it is possible to infer that a parent company had suffered the same loss as a subsidiary, was held not to be reflected in any of the judgments in *Johnson v Gore Wood* and, in any event, was obiter. Whether there exists such exception was open to doubt, but even if it did exist, it did not apply on the facts. Separately, A Ltd was held to have failed to prove that the defendant was a de facto director of A Ltd, and its claim for breach of fiduciary duty failed.

Goldtrail Travel Limited (in liquidation) v (1) Abdulkadir Aydin (2) Black Pearl Investments Limited (3) Onur Air Tasimaclik AS (4) Magnus Stephensen (5) Halldor Sigurdarson (6)Philip Wyatt [2014] EWHC 1587 (Ch) (Mrs Justice Rose), 22 May 2014)

Breach of Fiduciary Duty – Dishonest Assistance – Insolvency Set-Off

The Claimant (Goldtrail) was a holiday tour operator specialising in flights to Turkey. On 16 July 2010 it was put into administration by its sole director and shareholder, Abdulkadir Aydin. Goldtrail went into liquidation on 1 November 2010. Goldtrail, acting by its liquidators, brought a claim against Mr Aydin. In broad terms it was Goldtrail's case: that Mr Aydin misapplied Goldtrail's money by causing Goldtrail to transfer monies the defendants or entities controlled by them in order to facilitate payments that those defendants/entities were contractually bound to make to Mr Aydin or to his offshore company; and, that Mr Aydin allowed his personal interest to conflict with the interests of Goldtrail because he caused Goldtrail to enter into a long term commitments to purchase flight seats for which commission payment was made to Mr Aydin. After responding to a letter before action, Mr Aydin left the jurisdiction and took no part in the proceedings. The main claims at trial were against the other five defendants for dishonest assistance of Mr Aydin's breach of his fiduciary duties. The Judge found all the defendants liable for dishonest assistance. In the course of her judgment the Judge:

(1) Rejected the argument that Mr Aydin's conduct should be attributed to Goldtrail so that Goldtrail could not rely on the fraud in pursuing the dishonest assistance claims. The Judge held that the decision in *Bilta (UK) Ltd (in liquidation) v Nazir* [2013] EWCA Civ 968 that a director could not defeat a claim by attributing his own wrongful conduct to the company applied and it made no difference that those who dishonestly assisted the director were also victims of his fraud.

(2) Rejected the argument that dishonest assistance claims cannot succeed unless there is property held on trust, the breach of which would give rise to accessory liability (following *JD Wetherspoon Plc v Van de Berg* [2009] EWHC 639 and in *Fiona Trust & Holding Corporation v Privalov* [2010] EWHC 3199 (Comm)).

(3) Held that the misfeasant payments made by Goldtrail were not to be treated as "dealings" for the purpose of insolvency set-off on the basis that the decision in *Manson v Smith* [1997] 2 BCLC 161 on the position of a misfeasant director applied also to those who dishonestly assist the misfeasance.

[Hilary Stonefrost]

Lakatamia Shipping Co Ltd v Nobu Su & Ors [2014] EWCA Civ 636 (Rimer LJ, Tomlinson LJ, Sir Bernard Rix), 14 May 2014

Company Law – Freezing injunctions – Ability to deal with assets of wholly-owned company

The Court of Appeal followed its previous decision in *JSC BTA Bank v Solodchenko* [2011] 1 WLR 888, holding that the assets of a company wholly owned by a person subject to a freezing injunction were not directly affected by the injunction. However the person subject to a freezing injunction was restrained from procuring the company to make a disposition likely to result in a diminution in the value of his shareholding, as that would impermissibly diminish the value of his asset. In this case, S was the subject of a worldwide freezing order, which on its terms applied to all his assets, including any asset which he had the power to dispose of or deal with as if it were his own. The Court of Appeal upheld a decision ordering that the relevant assets could not be disposed of or dealt with without notice to the claimant. Whilst the freezing injunction did not apply directly to the assets of his company, he was restrained from procuring the company to make a disposition likely to result in any diminution in value of his shareholding. Practically, that was likely to mean that dispositions other than in the ordinary course of business were prohibited. However, the Court also held that the Judge's reasoning could not be supported. The Judge was incorrect to hold that the company's assets were within the definition of assets in the injunction; whilst they were "covered by" the injunction because dealing with them had the potential to diminish the shareholding, there was no basis on which it could be asserted that the standard form freezing injunction was either intended to bring, or had the effect of bringing, the assets of a company controlled by a defendant within the definition of a defendant's assets. Such assets were not "directly affected" by such an order.

Burry & Knight Ltd v Martin John Murless Knight [2014] EWCA Civ 604 (Arden LJ, Briggs LJ, Christopher Clarke LJ), 14 May 2014


HILARY STONEFROST

Company Law – Company register – Inspection – No-access orders – Proper

The Court of Appeal considered the meaning and effect of the Companies Act 2006, s. 117, in respect of a request for inspection of a company's register of members. K, a former director of the company, B Ltd, had made repeated requests over a period of some time for a copy of the register, motivated by concerns about alleged irregularities in the running of B Ltd dating back to the 1980s. In 2012 he made a formal request relying on s. 116. The reasons stated were a desire to study B Ltd's current shareholding, inform shareholders about his concerns regarding the past conduct of B Ltd's directors and advise them to obtain professional advice about future share valuation.

At first instance it was held that only K's third purpose (warning about future share valuation) was a proper purpose, and it was directed that B Ltd: (i) need not comply with the request; and (ii) pursuant to s. 117(4), need not comply with similar, future requests. The Court of Appeal confirmed that under s. 117(3), unlike the position in relation to its predecessor (Companies Act 1985, s. 353(6)), access to a company's register would be permitted unless the court was positively satisfied that the purpose was not a proper purpose. In the case of a request with multiple purposes, the right approach was to read the words "proper purpose" in s. 117(3) as including "proper purposes". The court was required to make a no-access order if any one of the purposes was improper. There was no exhaustive definition of "proper purpose". The term had to be given its ordinary, natural meaning. A purpose might be improper because of the end it sought to achieve, or way in which it sought a proper purpose. Further, the Court applied the decision in *Pelling v Families Need Fathers Ltd* [2002] 2 All ER 440 (being that the predecessor section, s. 356(6), conferred a discretion on the court to refuse inspection of a company's register), in relation to s. 117(3). The Court held that such no-access orders would enable appropriate policing as to whether a proper purpose existed. Alternatively, the court could accept an undertaking from the requesting party as to the purpose for which he would use the information obtained. The Court found, on the facts, that K's purposes were improper, but that the award of costs on the indemnity basis against K was wrongly ordered. **[Hilary Stonefrost]**

Re Cavell Insurance Company Ltd and others, Unreported, (Hildyard J), 17 March 2014


BARRY ISAACS QC

Company Law - Insurance business transfer scheme – Foreign business – Financial Services and Markets Act 2000, Part VII

Five applicant companies sought an order sanctioning an insurance business transfer scheme of their insurance and reinsurance business to the sixth applicant, under Part VII of the Financial Services and Markets Act 2000. Up to 75% of the transferring business was governed by the laws of EEA states other than the UK, the US, or other countries. The Court made the order sought, having regard to the facts that: (i) an order sanctioning the scheme would be recognised in other EEA states under European insurance and reinsurance directives; (ii) the Applicants' US legal advisers had confirmed that, in their view, the order would be recognised in the US; (iii) no more than 9% of the transferring business was governed by the laws of countries other than EEA states and the US; so that (iv) the order would be of substantial practical effect. **[Barry Isaacs QC]**

CORPORATE INSOLVENCY

Digested by ADAM AL-ATTAR

Re MF Global UK Ltd (Client Money Resolution Application) [2014] EWHC 2222 (Ch) (David Richards J), 4 July 2014


MARTIN PASCOE QC


ANTONY ZACAROLI QC


DANIEL BAYFIELD

Client Money – closure of client money trust – settlement between the firm as trustee and the administration estate – trustee's power of compromise – court approval – effect of compromise by a trustee on the claims of beneficiaries

CASS 7 and CASS 7A impose a mandatory regime for the distribution of client money. Upon the failure of a firm, a trust for the purpose of distribution is constituted in relation to client money in a firm's accounts. In the absence of perfect segregation, the firm as trustee of the client money trust (the CMP) is likely to have claims against the general estate for breach of trust, including proprietary claims contingent on tracing. Such claims can involve legal and evidential complexity. In particular, the unresolved issues in relation to the client money trust might involve a complex series of claims as between the respective estates. The special administrators of MF Global UK Limited (MFGUK) therefore applied to the Court, by a two stage process, for the approval of a compromise agreement agreed between the estates. The object was to enable a final distribution of the CMP thereby resulting in a benefit to clients and, because of the claims against the administration estate which impeded its final distribution, to creditors also. The first stage of the application was for directions as to process. The Court approved the appointment of separate administrators from within KPMG and separate legal teams at Weil Gotshal & Manges for the purpose of negotiating a settlement in principle which was then to be published to clients and creditors with appropriate consultation in addition to that. This first stage was necessary in the light of the conflict of interests and duties as between the estates.

The second stage was to apply for liberty to execute the compromise; at which hearing clients and creditors might object. The special administrators did not require approval to enter into a compromise but considered it appropriate given the appearance that the administrators were dealing with themselves. MFGUK as trustee of the CMP sought approval, first, because of uncertainty as to the application of the power to compromise under the Trustee Act 1925 and, secondly, because, under the jurisdiction explained in *Public Trustee v Cooper*, a trustee obtains protection against an allegation of breach of trust if the court should approve the compromise. The approval does not involve a surrender of the power of compromise to the court but an assessment by the court of the propriety of its exercise. The settlement agreed as between the general estate and the CMP resulted in substantial costs saving to each estate as against the comparator of litigating the respective claims. David Richards J was, in the circumstances, therefore prepared to approve the compromise, recognise that the compromise by the trustee of claims for breach of trust would have the effect of eliminating the individual claims of clients for breach of trust.

[Martin Pascoe QC, Anthony Zacaroli QC, Daniel Bayfield, Adam Al-Attar]

Re Zodiac Pool Solutions SAS [2014] EWHC 2365 (Ch) (Morgan J), 3 July 2014


GABRIEL MOSS QC


ADAM GOODISON

Scheme of Arrangement – Convening of Meetings of Creditors

Zodiac Pool Solutions SAS (a French company) and 5 other Zodiac group companies (incorporated in France, Finland and Delaware) applied for convening relief under Part 26 of the Companies Act 2006 in relation to a restructuring scheme of arrangement where the proposal was to extend the maturity dates and make other restructuring amendments. An objecting creditor who appeared at the convening hearing argued that the proposed single class of senior creditors would be wrongly constituted on three grounds, namely because certain creditors were connected to the Zodiac companies, because a substantial creditor had entered into sub-participation agreements in respect of its debt, and because the RCF should not be grouped with other facilities. The judge dismissed the objecting creditor's arguments and directed that a single senior class should meet. The judge held that (1) as regarded connected creditors, such connections

were an interest and not a right and thus they should be grouped in the senior class (rather than being a separate class); (2) the creditor who had sub-participated its debt was still a creditor, while the third party sub-participators were not creditors of the Zodiac companies (on the facts) and thus the sub-participation agreements did not lead to the requirement of a separate class; (3) the RCF creditors were all creditors for the purposes of class constitution and had the same or similar rights to the other senior creditors, and thus the RCF creditors were correctly placed in the senior creditor class. The objecting creditor accepted that whether there were sufficient establishments in the UK for 3 of the companies (relevant to overseas recognition) should be considered at the sanction hearing and not before. **[Gabriel Moss QC, Jeremy Goldring QC, Adam Goodison]**

Henderson v Foxworth Investments Ltd [2014] UKSC 41, Supreme Court (Lord Kerr, Lord Sumption, Lord Reed, Lord Carnwath and Lord Toulson), 2 July 2014

Scotland - transaction at undervalue – sale of premises by company – sale for cash and the assumption or a liability by the vendor – granted of security by purchaser to third party – liquidator alleged no consideration for sale and sought reduction of security granted – judge finding consideration adequate

In November 1994, LGDC purchased a hotel and golf course for slightly over £2m. In February 2001, LGDC sold the premises to NSL for consideration recorded as £248,100. In December 2002, LGDC went into liquidation and the respondent was appointed as its liquidator. In January 2003, NSL granted a standard security over the premises in favour of Foxworth. The liquidator of LGDC issued proceedings seeking the reduction of Foxworth's standard security on the basis that the disposition to NSL was a gratuitous alienation susceptible to reduction, under s 242 of the Insolvency Act 1986. The judge held that the sale of the premises by LGDC to NSL had been made for adequate consideration, under s 242(4) of the Act, as NSL had further assumed liability for the debt of £1.85m On the liquidator's appeal against that decision, the Extra Division of the Inner House of the Court of Session held that the judge had erred in law, as "part of the loan" in his judgment could not be read as referable to the £1.85m and the directors' evidence, that a decision to assume the indebtedness had been taken on behalf of NSL with the agreement of the relevant members of his family, had indicated a mere statement of intent, rather than an obligation to repay the debt. Lord Reed held that the judge had been correct to assess the question of whether or not there was a loan as one of the credibility of the evidence as to an agreement between family members. He then reviewed the judge's treatment of the evidence and concluded that the appellate court had been wrong to criticise the judge and to substitute its finding for that of the judge on that basis that he had been "plainly wrong". The judge's order was therefore restored.

Fibria Celulose SA v Pan Ocean Co Ltd [2014] EWHC 2124 (Ch) (Morgan J), 30 June 2014


MARK PHILLIPS QC

Cross-Border Insolvency Regulations – additional relief – whether foreign law available by way of additional relief

The applicant, Pan Ocean, was a South Korean company subject to rehabilitation proceedings in Korea. Its foreign representatives applied for additional relief under the CBIR in order to avoid a term of a contract with Pan Ocean's counterparty, Fibria. The applicant had terminated other contracts with Fibria but did not wish to terminate the remaining contract and, to that end, sought to avoid Clause 28 of the remaining contract, which provided a right to terminate and close-out upon, amongst other events, a bankruptcy event of default. Such clauses are effective as a matter of English law however other systems, for example the United States characterises such clauses as *ipso facto* clauses and place constraints upon the power to terminate an executory contract upon or following bankruptcy. Morgan J proceeded on the assumption that there was a good arguable case that Korean law would avoid a clause which entitled termination of an executory contract on bankruptcy. The question accordingly was whether the Court could apply Korean law by way of additional relief under the CBIR. Morgan J held that the phrase "any appropriate relief" in article 21 of the CBIR was constrained by the following subparagraphs and did not confer the power to apply foreign law. He declined to regards the decision to the

United States Court of Appeals in *Re Condor Insurance Co Ltd* 601 F 3d 319 (Fifth Circuit 2010) as persuasive authority as to the meaning of the CBIR, in particular, in the light of the different implementation of the UNCITRAL Model Law by Chapter 15 of the United States Bankruptcy Code. Morgan J agreed with the analysis set out in *Sheldon, Cross-Border Insolvency 3rd edition*. **[Mark Phillips QC, Stephen Robins]**

Hosking and Bonny v Slaughter and May [2014] EWHC 1390 (His Honour Judge Cooke), 13 June 2014

Appeal against the decision of Registrar Jones – disbursements paid by administrator and challenged by subsequent liquidator

Slaughter and May acted for the administrators of Hellas. The administration was followed by liquidation. The liquidators applied to the Court for a detailed assessment of 13 of Slaughter and May's invoices that had been agreed and paid by the former administrators. The liquidators' application was made pursuant to rule 7.34 of the Insolvency Rules 1986 and the inherent jurisdiction of the court. The Registrar dismissed the application (see page 20 of the February 2014 edition of the digest). The liquidators appealed.On the appeal the Judge:
(1) Rejected the submission that decisions of administrators in the course of the administration could be retaken or undone by the liquidators on the grounds that the "responsible insolvency practitioners" (as defined in rule 13.9) were the administrators for the purpose of deciding whether to agree and pay the costs or have them subject to detailed assessment pursuant to rule 7.34.
(2) Held that once the administration had come to an end the administrators ceased to be the "responsible insolvency practitioners" for the purpose of rule 7.34 and that the costs that had been incurred by the administrators as an expense in the administration but were agreed and paid by the former administrators after the end of the administration had not been validly agreed by them because the liquidators not the administrators were, after the end of the administration, "the responsible insolvency practitioners".
(3) Held that the Registrar had been wrong to describe the effect of rule 7.34(4) as applying to any bill "that refers to legal proceedings" and decided that as that the rule gives the power to make an order "in …proceedings before the court" it can only apply to a costs order made by the court seized of the proceedings.
(4) Declined to express any opinion as to whether there are circumstances in which the court may exercise an inherent jurisdiction to direct a detailed assessment of the fees (because he did not need to do so). **[Hilary Stonefrost]**

Eddie Stobart Group Limited v (1) The Registrar of Companies (2) Innovate Logistics Limited ChD, 23 June 2014, (Asplin J)


WILLIAM WILLSON

Restoration of struck off company – "double-barrelled" administration order

The Court considered an application for a "double-barrelled" administration order i.e. an order to restore a dissolved company to the register and then make an administration order. 3 years after being put into administration the company had been dissolved in 2011 pursuant to the procedure in paragraph 84, Schedule B1 of IA86. It subsequently transpired that the company was owed a substantial tax rebate from a local county council which, if received, would be sufficient to pay all the company's preferential creditors. An unsecured creditor of the company, Eddie Stobart Group Limited, applied to restore the company under section 1029 of CA06, to put it into administration under paragraph 12, Schedule B1 and to appoint the former office-holders as administrators. The Court granted the application, concluding that it had jurisdiction to make a "double-barrelled" administration order. It did so for the following reasons: 1) the application was made by a creditor; 2) it was clear on the evidence that a considerable sum of money would become available from the rebate; 3) since the company had been dissolved under paragraph 84, the application fell squarely inside section 1029 of CA06; 4) the proposed order would avoid the expense and formalities of a liquidation which was inevitably a "better result" for creditors under paragraph 3, Schedule B1 (and in any event there would be a distribution to preferential creditors). In those circumstances, and because there was evidence that the former office holders approved the application, the proposed order was appropriate in this case. **[William Willson]**

The Financial Services Commission v Lemma Europe Insurance Company Limited BVIHC (Com) No. 318 of 2012 (Bannister J, 11 June 2014) Eastern Caribbean Supreme Court, British Virgin Islands, Commercial Division


GLEN DAVIS QC

Deposit – Trust – Charge

Lemma Europe Insurance Company Limited ("Lemma") was required to deposit funds in a bank account in the BVI as a condition of being granted a license to write local insurance business. Lemma was incorporated in Gibraltar and a winding-up Order was made by the Supreme Court of Gibraltar on 24 January 2013, on a petition presented on 19 September 2012. At the date of commencement of Lemma's winding up in Gibraltar, the amount deposited in BVI was a little over US$1.5 million.Bannister J found that there had been no declaration of trust, and there was no other overt act from which the inference could be drawn that Lemma had treated the fund in the BVI as the property of anyone other than itself. The fund therefore remained throughout in the beneficial ownership of Lemma.
At the suggestion of the Judge during the hearing, the FSC amended its pleadings to raise an allegation that in establishing the fund, Lemma had appropriated the monies to discharge domestic liabilities and was accordingly subject to an equitable charge to secure liabilities.
The Judge found that no particular creditor, nor the domestic creditors as a body, could have obtained a right to apply to the court for an order that particular debts were to be discharged out of the fund. Nonetheless, the intention was clear that, although the fund remained the property of Lemma, it was to remain available in the BVI to discharge liabilities of Lemma's domestic business if Lemma itself failed to discharge them in the ordinary course. Lemma had surrendered control of the fund to the FSC, and the effect of the arrangements was to put the fund beyond the reach of the general body of Lemma's creditors unless and to the extent that the FSC agreed. The fund therefore at all times stood charged with the satisfaction of Lemma's liabilities incurred in the course of domestic business in the BVI and not discharged in the ordinary course. No principle of comity was infringed; the fund has never been available to the general body of Lemma's creditors.
[Glen Davis QC]

Rollings & Ors v O' Connell [2014] EWCA Civ 639 (Kitchin, Floyd and Fulford LJJ), 21 May 2014


ADAM AL-ATTAR

Administration – paragraph 71, Schedule B1 – appeal against judge's order entitling sale of fixed charged assets as if free from security

The administrators of Musion Systems Limited (MSL) had applied on an urgent basis in the vacation for an order permitting them to sell fixed charged assets as if free of that charge. The chargee had refused to consent and the purchaser had negotiated a right to withdraw from the asset purchase agreement if an order overriding that refusal were not obtained by a given date. The trading position of MSL was such that, in the light of prospective employee and rental liabilities, the company would have to be liquidated if a sale were not achieved within that timeframe.
Warren J granted the order; however, he found one aspect of the case particularly difficult. The assets (IP rights) to be sold were the subject of an arbitration (to which MSL was not a party) commenced by a company controlled by the chargee. If determined in favour of the chargee the asset might have been worth a very substantial amount, potentially many millions of pounds. If determined against the chargee, the assets would be worth nothing. The question was whether the uncertainty that affected the assets' value, which might be revolved favourably in the future, warranted a refusal of an order under paragraph 71 of Schedule B1 on the ground that the chargee wished to postpone the sale to a later time. Warren J accordingly gave permission to the chargee to appeal against the exercise of his direction. It was common ground that the sale was reasonably likely to promote the purpose of the administration and therefore that Warren J had had jurisdiction to grant the relief sought. The Court of Appeal upheld the judge's exercise of his discretion. The importance of the case is the rejection of the submission that "overwhelming" weight was to be attached to the view of the chargee because, on the assumed facts for the purpose of the application, only the

chargee (and not any unsecured creditor) was likely to receive a distribution. The effect of the sale was to secure the jobs of the employees and to, in real terms, reduce the liabilities of MSL's creditors as wage arrears and accrued rental liabilities would not go unpaid as such liabilities were to be assumed by the purchaser. Further, the Court of Appeal held that the marketing and sales process conducted by the administrators – including a "contract race" as between competing bidders – had been fair and therefore had achieved a market price. The absence of a paper valuation supporting the sale did not mean that the administrators had not achieved a market price. **[Adam Al-Attar]**

PERSONAL INSOLVENCY

Digested by MATTHEW ABRAHAM


MATTHEW ABRAHAM

Hayes v Hayes, Unreported, (Nugee J), 12 June 2014

Cross-examination of a debtor in order to establish a cross-claim

The Court upheld the decision of a bankruptcy registrar refusing to allow cross-examination of a debtor in order to establish the genuineness of a cross-claim in bankruptcy petition proceedings. Nugee J held that, although an insolvency court had an inherent jurisdiction to require cross-examination, such jurisdiction was to be determined by an application for directions, and not under the CPR r.32.5.

The appellant petitioner (C) appealed against a registrar's dismissal of a bankruptcy petition that she had presented against the respondent (T), her former husband. During the course of the bankruptcy order hearing, the registrar refused C permission to cross-examine T in relation to the genuineness of his cross-claim on the basis that it was not permitted under insolvency practice. The registrar refused to make a bankruptcy order sought by C on the basis that there was a real and substantial dispute in relation to T's cross-claim. Nugee J, reviewing the interaction between the Insolvency Rules 1986 and the CPR, stated that before the CPR, it was the clear practice of the insolvency courts to determine whether there was a real and substantial cross-claim in response to a demand without cross-examination. As a result of the normal position the registrar had not been wrong to start from the position that it was for C to persuade him to allow oral evidence and that the situation was not one in which cross-examination was automatically available. It was further noted by Nugee J that the court should be slow to move from the normal position. The reason for this was because an insolvency court, although able under its inherent jurisdiction, was not generally suited to try disputes. To allow cross-examination to test the genuineness of a cross-claim would lead to a preliminary trial on the merits but without the safeguards of disclosure and other procedural safeguards.


JOHN BRIGGS

Re Edmondson [2014] EWHC 1494 (Ch) (Asplin J), 12 May 2014

Income Payment Orders – ss.310 and 310A of the Insolvency Act 1986

The Court held that it had jurisdiction to make a second income payments order under the Insolvency Act 1986, and a bankrupt's argument that the income payment regimes in s.310 and s.310A were parallel but mutually exclusive was rejected.

The Respondent was made bankrupt on the petition of HMRC in August 2012. As a result of the bankruptcy order his tax code was changed to "NT" with the effect that income tax was not deducted from his earnings. On 6 December 2012 joint trustees were appointed. On 7 December 2012, as a way of contribution to his bankruptcy, the Respondent made a s.310A Income Payments Agreement with the Official Receiver to pay the receiver or any trustee of his bankrupt estate the amount by which his take-home pay was increased by virtue of the change in tax code. The Income Payments Agreement was expressed to continue until the end of the tax year, in other words, until 5 April 2013.

In May 2013 the then joint trustees sought to establish the Respondent's income and expenditure for the purpose of finalising a further Income Payments Agreement. The Respondent refused to agree a further Income Payments Order and so on 19 August 2013 the then joint trustees applied for an Income Payments Order pursuant to s.310 Insolvency Act 1986 for the duration of three years from the date of the Order. On the application the District Judge made a declaration that the then joint trustees in bankruptcy were not entitled to an Income Payments Order against the

Respondent pursuant to s.310 Insolvency Act 1986 in circumstances where the bankrupt had previously entered into an Income Payments Arrangement pursuant to s.310A. In allowing the appeal Asplin J held that the ordinary meaning of s.310 was clear, and if a limitation had been intended as a result of the introduction of s.310A and specific amendments to s.310, it would have been made explicit at the time of the express amendments made by the Enterprise Act 2002 s.259 and s.260. Asplin J also held that: "even if the Respondent is correct and it was Parliament's intention that a bankrupt should not be required to pay part of his income to his trustee in bankruptcy for more than 3 years, the potential for an anomaly if there is jurisdiction to make an Income Payments Order despite an Income Payments Agreement having already been entered into is met by the existence of the discretion of the judge when exercising the jurisdiction whether to make the subsequent order and if so, the length of the order in question." **[John Briggs]**

Girdhar and anr v Bradstock [2014] EWHC 1321 (Ch) (Jonathan Klein), 9 May 2014


CHRISTOPHER BROUGHAM QC

IVA challenges - unfair prejudice - material irregularity

The Court followed *Smith-Evans v Smailes* [2013] EWHC 3199 (Ch); [2014] 1 WLR 1548 and gave a similarly purposive construction to Part VIII of the Insolvency Act 1986. The claimant's IVA was approved in December 1999 and he was subsequently made bankrupt on the supervisor's petition. In 2010 the claimant commenced proceedings in the Chancery Division against the defendant (the nominee, supervisor and trustee) claiming a declaration that the claimant's IVA was a nullity on the basis, among others, that HMRC's proxy did not authorise the chairman to vote in favour of certain modifications put forward on the claimant's behalf, although the chairman purported to do so. The judge found this allegation to be true but concluded that there was clear and unequivocal evidence that HMRC had subsequently ratified the otherwise unauthorised exercise of its proxy. In dismissing the claim, the judge expressed the view that "this claim may be a paradigm of the anomalies undermining the integrity of the IVA process which would arise if an unauthorised exercise of a proxy is more than a material irregularity" (at [123]). **[Christopher Brougham QC]**

PROPERTY & TRUSTS

Digested by STEPHEN ROBINS

FHR European Ventures LLP & Ors v Cedar Capital Partners LLC [2014] UKSC 45 Supreme Court (Lord Neuberger (President), Lord Mance JSC, Lord Sumption JSC, Lord Carnwath JSC, Lord Toulson JSC , Lord Hodge JSC, Lord Collins JSC), 16 July 2014


STEPHEN ROBINS

Breach of Duty – Constructive Trust – Bribe/Secret Commission -Tracing

On 22 December 2004, F purchased the issued share capital of M from S for €211.5m. C had acted as F's agent in negotiating the purchase. C accordingly owed fiduciary duties to F. C had also entered into a commission agreement with S, which provided for the payment of $10m to C in the event of a sale of the shares in M. S paid €10m to C on or about 7 January 2005. On 23 November 2009, F commenced proceedings against C for recovery of the sum of €10m. The trial Judge held that C had acted in breach of duty by failing to disclose the commission agreement to F. He ordered C to pay $10m to F but he declined to grant any proprietary remedy to F. F appealed to the Court of Appeal, which made a declaration that C had received the €10m on constructive trust for F. C appealed to the Supreme Court. The Supreme Court dismissed the appeal. The Supreme Court held that any benefit acquired by an agent as a result of his agency and in breach of his fiduciary duty is held on trust for the principal. Therefore a bribe or secret commission should be treated as the property of his principal, rather than merely giving rise to a claim for equitable compensation. Bribes and secret commissions undermine trust in the commercial world and the law should be particularly stringent in relation to a claim against an agent who has received a bribe or secret commission. Further, the bribe or commission will very often have reduced the benefit from the relevant transaction which the principal will

have obtained, and therefore can fairly be said to be his property. Finally, it is just that a principal whose agent has obtained a bribe or secret commission should be able to trace the proceeds of the bribe or commission into other assets and to follow them into the hands of knowing recipients. *Metropolitan Bank v Heiron* (1880) 5 Ex D 319 and *Lister & Co v Stubbs* (1890) 45 Ch D 1 were wrongly decided and should be overruled.

Bank of Scotland Plc v Forrester [2014] EWHC 2036 (Ch) (Simon Monty QC), 20 June 2014

Beneficial Ownership - Trust – Change of Position – Detrimental Reliance

F, who owned a property, was made bankrupt in 1994. N, who was F's son, purchased the property from the trustee in bankruptcy. F remained in occupation of the property and made payments to N. N re-mortgaged the property to B, but defaulted. B sought possession. F claimed a declaration that N held the legal title on trust for F. F asserted he and N had agreed that the property would be transferred to N but that the beneficial interest would remain with F. N denied that there had ever been any such agreement, stating that he had acquired the beneficial interest. The court accepted F's evidence in respect of the agreement with N. The court rejected N's evidence that he had bought the property as an investment. The court also rejected N's submission that, had there been an agreement, it would have been put into writing; the court accepted F's evidence that he had trusted N and that the need to put anything in writing had not crossed anyone's mind. Although there were significant advantages to F in that he remained in the property, he had acted to his detriment and significantly changed his position in reliance on the agreement. If there had had been no express agreement, there had been an intention, common to both F and N, that F should have the entire beneficial interest in the property, and there had been detrimental reliance. Accordingly, the beneficial interest in the property remained with F and had not passed to N.

SPORT

Digested by MARCUS HAYWOOD

Danish Kaneria v England & Wales Cricket Board Ltd (ECB) [2014] EWHC 1348 (Comm) (Hamblen J), 6 May 2014


MARCUS HAYWOOD

Arbitration - Cricket - Costs

In imposing and upholding costs orders and a life ban against a cricketer following a finding that he had acted as a "recruiter of spot-fixers", an appeal panel had not exceeded its powers and there had been no serious irregularity. It could not be shown that it had reached a conclusion of law which was obviously wrong or even open to serious doubt. Hamblen J so held on the application of a cricketer to set aside an award made by the appeal panel of the ECB. The cricketer had admitted to bowling deliberately badly in return for financial reward. On appeal, the appeal panel also found that he had acted as a "recruiter of spot-fixers". The issues were whether (i) the applicable regulations were the ECB's 2009 Cricket Disciplinary Regulations in relation to which the cricketer had signed a letter of undertaking and under which costs were limited to £2000; (ii) the appeal panel exceeded its powers under the Arbitration Act 1996 s.68(2) in imposing a life ban; (iii) the tribunal erred on a question of law under s.69 as to the imposition of the life ban; (iv) the principle of *lex mitior* (namely, that if the law relevant to an offence has been amended, the less severe law should be applied) applied to the costs orders; (v) the appeal panel had erred on a question of law in finding the cricketer guilty. Hamblen J held that: (1) The applicable regulations were those in force when the proceedings were brought: while the instant proceedings for breach of ECB directives related to those applicable in 2009, that did not mean that they were governed by the regulations applicable to proceedings brought in 2009. The 2009 Directive provided that each person would comply with all "Rules, Regulations, Directives and Resolutions of the ECB for the time being in force". By agreeing to comply with the regulations "for the time being in force", the cricketer had agreed to be bound by the regulations in force at the time of proceedings brought against him. (2) It was clear that ECB had had power under the 2009 Directive to impose the life ban. (3) The appeal panel had an absolute discretion to impose any penalty within its general powers. It had given cogent and compelling reasons, had not acted arbitrarily or capriciously, and had not had regard to extraneous matters. (4) The appeal panel's conclusion in relation to *lex mitior* was supported by the relevant regulation for disciplinary proceedings. Costs were paid to indemnify; they were not a punishment, nor were they dependent on any rule being broken. (5) As to the finding of the cricketer's guilt, the facts were a matter for the appeal panel, not the court.

Swinton Reds 20 Ltd v McCory [2014] EWHC 2152 (Ch) Ch D (N Strauss QC), 1 July 2014

Football - Contract law - Company law

The issue in this case was, who was the ultimate owner of Swindon Town Football Club Ltd ("the club"). The claimant ("Swinton Reds"), a company owned by Lee Power, sought rectification of the register of the defendant company ("Seebeck"), which owned 98.5% of the shares of the club. Swinton Reds claims to have acquired 99% of the shares in Seebeck from the first defendant, Gerard McCrory. In effect, this was a claim to enforce a Share Subscription Agreement dated 11th April 2013 ("the SSA"), by which Mr. McCrory agreed to sell Swinton Reds 99% of the shares in Seebeck, so as to give him effective ownership of the club, subject to an option in favour of Mr. McCrory to buy back 39% of the shares in Seebeck (giving him 40% in all) at a nominal price. The SSA was subject to certain conditions precedent which had to be satisfied within 14 days. It was common ground that they were not satisfied within that period. The claimant contended that the parties had agreed through a series of texts and emails that there would be an extension of the period from 14 days to three years, and that such an extension was within the absolute discretion of the defendants. The defendants denied this. The principal issues were (i) whether the period for satisfaction of the conditions precedent had been extended; (ii) if not, whether the parties had subsequently entered into a new agreement on the same terms, but with an extended three-year period.

The Judge held, amongst other things, that: (1) Any agreement as to an extension was subject to the approval of the parties' solicitors. The SSA was a complex agreement which had been drawn up by the solicitors and, on any sensible view, either party's solicitors might well have had reservations about the effect of extending the period for so long in respect of certain obligations. In the circumstances, the period for satisfaction of the conditions precedent had not been extended and the SSA had ceased to exist on that date. (2) The parties had, however, reached a clear agreement to revive the agreement with a new period for completion. The terms governing the parties' rights and obligations were clear and certain. All that was wrong was the legal designation of what was agreed. However, agreement as to its legal designation was not a necessary ingredient of a contract. The defendants' argument that there was no new agreement because the parties thought they were varying the original SSA, which they could not do as it had ceased to exist, if correct, would defeat the plain intention of the parties regarding their respective rights and obligations and would have a troubling effect in many cases. Whether an agreement was a new contract or a variation in terms was often a difficult question, and was not straightforward in the instant case. It would be absurd if the existence of a contract depended on whether the parties were able to categorise correctly the agreement they had made.

DANISH KANERIA: THE CRICKETER FAILED TO SET ASIDE AN AWARD MADE BY THE APPEAL PANEL OF THE ECB

The 'purview' doctrine: a trump card for guarantors?

Mark Arnold QC considers the latest cases on the purview doctrine and the limits of anti-discharge clauses in guarantees.

Guarantors, long known as amongst the most adventurous of litigants when exploring the boundaries of their liability, are placing increasing reliance on the "purview" doctrine. Within the last decade, it has been considered in no fewer than four decisions of the Court of Appeal, the first in 2005, the other three all in 2013. What do they tell us about the "purview" doctrine and its limits?

Historical background

It is a well-established and strictly applied principle of law that any variation in the terms of the agreement between a creditor and a debtor which could prejudice a surety will discharge the surety from liability unless he consents to the variation: *Holme v Brunskill*[1]. This is because, if the variation could prejudice the surety, it alters the nature of the risk which he has undertaken; and he (rather than the Court or anyone else) is to be the sole judge of whether he wishes to continue to be bound or not. The surety is discharged in such circumstances even if he is not actually prejudiced by the variation. Although he may not be discharged if the alteration is insubstantial or cannot be prejudicial to him, this must be obvious, i.e. evident without inquiry. The Court will not engage in an inquiry as to the effect of the alteration if the effect of the alteration is unclear: *Holme v Brunskill*[2].

Against this background, the practice grew up of including anti-discharge (or indulgence) clauses in contracts of guarantee. Although there is no standard wording for such clauses, they typically provide (amongst other things) that the surety will not be discharged from liability in the event that the contract the performance of which is guaranteed is amended or varied. At the same time, clauses were included in contracts of guarantee by which sureties effectively consented in advance to future amendments or variations to the contract guaranteed, sometimes in the widest terms.

From an early stage, however, it was considered that "assent, whether previous or subsequent to a variation, only renders the surety liable for the contract as varied, where it remains a contract within the general purview of the original guarantee … If a new contract is to be secured there must be a new guarantee": *Rowlatt on Principal and Surety* (1898, 1926), adopted by Lord Atkin in *Trade Indemnity Co Ltd v Workington Harbour and Dock Board*[3]. In the *Trade Indemnity* case, the House of Lords was concerned with (so far as concerns this article) the terms of a proviso to a bond for the due performance of a contract to build a dock at Workington, in the following terms:

"Provided always and it is hereby agreed and declared that the Surety shall not be released or discharged from the above written Bond by any agreement which may either with or without the assent or notwithstanding the dissent of the Surety be made between the Contractors and the Owners or between the Contractors and the engineers in the contract mentioned for any alteration in or to the said works [ie to build a dock] or the contract …" (my emphasis)

The debtor company subsequently entered into two loan agreements to fund part of the works. The question arose whether, under the terms of the bond, the surety was liable in respect of those loans. The House of Lords concluded that the surety was not so liable.

For present purposes, it is interesting to note at this stage that, immediately before referring to and

1/. (1877) 3 QBD 495
2/. Cotton LJ at 506
3/. [1937] AC 1, at 21

CIMC RAFFLES: THE PURVIEW DOCTRINE - PURE CONSTRUCTION OR A DOCTRINE OF LAW?

approving the extract from Rowlatt quoted above, Lord Atkin observed that the words underlined were very wide, and added:

"Probably they would have to be cut down so as not to include such changes as have been suggested as substituting a cathedral for a dock, or the construction of a dock elsewhere, or possibly such an enlargement of the works as would double the financial liability."

The general purview of the guarantee

Apart from two cases at first instance[4], the purview doctrine subsequently appears not to have aroused the interest of sureties until 2005. Since then the doctrine and closely related matters have been the subject of consideration by the Court of Appeal in four cases. They are: (1) *Triodosbank NV v Dobbs*[5]; (2) *Hackney Empire Ltd v Aviva Insurance Ltd*[6]; (3) *National Merchant Buying Society Limited v Bellamy and Mallett*[7]; and (4) *CIMC Raffles Offshore (Singapore) Ltd v Schahin Holding SA*[8]. Their effect is summarised below.

Triodosbank NV v Dobbs

The relevant contractual provisions of the original (1996) loan agreements are set out in paras [8]-[10] of the judgment of Longmore LJ. The guarantor guaranteed that it would on

4/. The Nefeli [1986] 1 Lloyds Rep 339 (Bingham J); Melvin International SA v Poseidon Schiffahrt GmbH (The Kalma) [1999] 2 Lloyds Rep 374 (Cresswell J).
5/. [2005] 2 Lloyds Rep 588
6/. [2013] 1 WLR 3400
7/. [2013] EWCA Civ 452
8/. [2013] 2 Lloyds Rep 575

MARK ARNOLD QC

demand pay and discharge all monies and liabilities "which now are or may at any time hereafter … be due … under or pursuant to the Loan Agreement". The guarantor's liability was stated not to be affected by an arrangement which the bank "may make" which might otherwise operate to diminish or discharge the liability or provide a defence to the surety. Further, and without reference to the guarantor, the bank was permitted to agree to any amendment or variation of an obligation of the company under the loan agreement. The bank reserved the right to vary the interest rates. The loan could be repaid in part at any time, and subsequent repayments would then be rescheduled under a new agreement between bank and borrower.

The loan agreements were subsequently replaced in 1998 (twice) and again in 1999. The first 1998 agreement was simply a rescheduling of existing indebtedness; the second was not but was an agreement instead for a substantially higher sum for purposes different from and additional to the 1996 loan agreement which it replaced: [10]. The 1999 agreement was a replacement on terms very different from the original in relation to amount and purpose and in other important respects, such that the Court of Appeal considered that it could *not* be regarded as an amendment or variation of the original agreement:the surety was not liable.

The following propositions may be derived from the judgments:

(1) A power to amend or vary without further reference to the guarantor, in the terms of the relevant clause in that case, must at least encompass amendments or variations expressly contemplated by the agreement, even if formally they are set out in a new agreement: [8].

(2) As a matter of principle, there is no reason why such a power should not also extend to anything rightly termed a variation or an amendment even if it is not expressly contemplated by the agreement: [9]. The question is whether what is said to be an amendment or variation is properly so called.

(3) Even if the new agreement could in principle constitute an amendment or variation of the original, it would still be necessary to consider whether it was "within the general purview of the original guarantee": [14].

(4) It is important in this context to distinguish between a true variation of an existing obligation and the entering of what is in fact a different obligation (even though it purports to be no more than a variation), although drawing a hard and fast line between what is permissible and what is not is "not easy": [16]-[17], [34].

(5) A guarantor is not to be taken to have agreed that his liability under the guarantee would be increased or made more onerous by a subsequent agreement made between the lender and the borrower (to which he is not party) unless there are clear words in the guarantee which show that he did agree to be bound to a more onerous obligation in the future imposed without further reference to him: [34].

It is tolerably clear from the judgments (particularly that of Chadwick LJ) that the question, ultimately, is one of contractual interpretation: do the amendments or variations fall within the scope (or purview) of what is envisaged or permitted by the terms in which the guarantee was originally given? As such, it falls to be determined by reference to the usual principles of contractual construction as set out in *Investors Compensation Scheme Ltd v West Bromwich Building Society*[9], as subsequently explained in other decisions of the House of Lords and the Supreme Court, notably *Rainy Sky SA v Kookmin Bank*[10].

Hackney Empire Ltd v Aviva Insurance Ltd

This was confirmed in the *Hackney Empire* case, in which Jackson LJ (with whom Moses LJ and Sir John Thomas P agreed) said at [71]: "Each indulgence clause must be construed according to its terms and by reference to its context." While the *Triodosbank* case was cited in argument, however, it was not referred to in the judgment.

The following further propositions are to be derived from the *Hackney Empire* case (at [78]-[79]):

(1) The rule in *Holmes v Brunskill* only applies where parties to the contract guaranteed vary its terms without the consent of the surety.

(2) A distinction is to be drawn between (i) advance payments of the agreed contract price by an employer to a contractor, which (subject to (3) below) may discharge the surety from liability; and (ii) additional payments made by the employer under a separate agreement rather than under the contract guaranteed by the surety, which will not discharge the surety from liability (although he will not be liable for obligations under the new agreement, which he did not guarantee).

(3) A surety will not be released from liability by reason of contractual variations or advance payments if (i) he has specifically consented to what was done or (ii) there is an indulgence clause which covers what was done.

Hackney Empire itself (like *Trade Indemnity*) was a separate agreement case which did not involve the amendment or variation of the original contract which had been guaranteed. Accordingly, the surety was not discharged from liability under the contract guaranteed, but nor was it liable for the contractor's default under the separate agreement. The rule in *Holme v Brunskill* did not apply.

National Merchant Buying Society Ltd v Bellamy and Mallett

It was held that the rule in *Holme v Brunskill* did not apply in the *Mallett* case either, albeit for a different reason. In that case, the directors of a company gave the Society a joint and several guarantee for the due payment of all sums then or thereafter owing to it by the company: [12]. According to Rimer LJ who gave the leading judgment (with which Kitchin and Longmore LJJ agreed):

(1) A guarantee is merely a particular type of contract. The relevant question in every case is: what is the nature of the guarantee obligation that the guarantor has assumed? That turns on the interpretation of the guarantee, as to which there are no special rules: [39].

(2) A distinction is to be drawn between (i) a guarantee of the due performance of obligations arising under a specific contract, in which case that will be the limit of the guarantee obligations and the rule in *Holme v Brunskill* will apply; and (ii) a guarantee in respect of obligations arising out of a contemplated course of dealing rather than under a specific contract, in which case the details of the manner of dealing as between principal debtor and creditor, or any variations in them, are of no concern to the surety provided that the course of dealing

It is "not easy" to draw a line between what is permissible and what is not …

…but in a contract to build a dock, it would not be permissible to substitute a cathedral for the dock.

9/. [1998] 1 WLR 896 (HL)
10/. [2011] 1 WLR 2900

itself remains within the scope of that contemplated by the guarantee: [31]-[33].

(3) A freestanding "all monies" guarantee in respect of present and future indebtedness commonly given by directors to banks in respect of their company's liabilities is a typical example of the latter, such that the rule in *Holme v Brunskill* does not apply: [33].

CIMC Raffles Offshore (Singapore) Ltd v Schahin Holding SA

The *CIMC Raffles* case also recognises that different considerations apply, or may apply, to "all monies" guarantees: subject to the possibility of a cap, "it covers not only current but also future liabilities and at the same time obviates discharge by strenuous anti-avoidance provisions" (per Sir Bernard Rix at [53]).

Otherwise, however, this case (being the most recent, decided in June 2013) is perhaps the most difficult and least conclusive. Ultimately, all it decided was that the guarantor had raised an arguable defence on the question whether (i) the purview of the guarantee extended to certain liabilities arising out of post-guarantee amendments and/or (ii) the guarantor was discharged from liability by virtue of the amendments, such that the matter should proceed to trial. In doing so, however, the decision appears to raise more questions than it answers. This is particularly unhelpful in circumstances where it is the only one of the recent decisions expressly to discuss the *Triodosbank* case or the purview doctrine itself.

The decision appears to support the following propositions:

(1) It is not absolutely clear what the purview doctrine is. In particular, there are sound arguments both (i) that it is a doctrine of pure construction and (ii) that it is a doctrine of law reflecting the equitable concerns of *Holme v Brunskill*, however much it may be influenced by matters of interpretation: [51]. Its precise nature has, therefore, yet to be determined.

The greater the change, the greater the risk it will fall outside the purview of the original guarantee

(2) The purview doctrine applies in (at least) two situations, namely: (i) where the issue is not with the discharge of the guarantee but with its scope – it either applies to the new arrangement or it does not, a question of "pure construction"; and (ii) where the question is not directly the scope of the guarantee, but whether an anti-discharge provision operates to exclude the rule in *Holme v Brunskill*.

(3) It is at least arguable (but has not yet been determined) that, however apparently wide the anti-discharge language may seem to be, the question always has to be asked whether the new events lie within the purview of the guarantee as a whole, including its anti-avoidance provisions: [54].

(4) In that context, while the provision of a guarantee which renders the guarantor a primary obligor is prima facie a powerful clause for the purpose of excluding the *Holme v Brunskill* doctrine, it is nevertheless reasonably arguable that it does not operate to exclude the purview doctrine: [60].

Tantalisingly, the case appears to accept in principle that the purview doctrine itself may be excluded (this follows from (4) above); but it offers no guidance as to how this might be achieved.

On the facts of the case, it was arguable whether or not the post-guarantee amendments fell within the purview of the guarantee. Ultimately, the questions of construction and the "closely allied" question of the purview of the guarantee had to be considered as a whole in the light of the evidence at trial: [65].

Guiding principles

Just what the nature and extent of the purview doctrine may be above and beyond a doctrine of construction, therefore, the *CIMC Raffles* case does not clearly explain. Regrettably, clarity as to that as well as the manner in which (if at all) it may be excluded must await further development in the law. In the meantime, the proper approach for practitioners on the basis of these authorities would seem to be as follows:

(1) Consider first the scope and effect of the guarantee, including its anti-discharge provisions, as a matter of construction having regard to the words used considered in their context. That this is at least the starting-point seems clear from each of the cases mentioned. As a matter of common-sense, this must be so when considering the effect of what is, ultimately, just a contract (albeit one with special attributes).

(2) This must involve ascertaining at least the following:

(a) What is the guarantee obligation which has been undertaken?

(b) What variations or amendments are specifically contemplated by the terms of the guarantee?

(c) What variations or amendments are at least impliedly (if not expressly) contemplated by the terms of the guarantee?

(3) Attention must then turn to what has actually been done. In particular, has the amendment or variation merely amended or varied an existing obligation to which the guarantee relates, or has it in fact created a new obligation to which the guarantee does not relate and which it does not contemplate?

THE HACKNEY EMPIRE: ADVANCE PAYMENTS OR ADDITIONAL PAYMENTS?

Inevitably, however, even approaching the matter in this way only gets one so far.

Practical guidance: where is the line to be drawn?

The practical question that obviously arises remains: what will fall within the purview of the original guarantee and what will not? Where is the line to be drawn? That is clearly the critical question for lenders and guarantors alike, and therefore for practitioners as well. It is notable that this is a question which the Court of Appeal itself declined to answer in *Triodosbank* (in which Longmore LJ said at [17]: "It is indeed not easy to draw a hard and fast line between permissible and impermissible variations …"). In that case, the increased commitment was £2.6 million, as against original facilities of £900,000 (i.e. an increase of over 100%). That, together with the change in purpose, was found to be sufficient to take it outside the general purview of the original contract.

In the absence of a clear statement from the courts, some practical guidance may be derived from the speech of Lord Atkin in *Trade Indemnity Co*, acknowledged by Sir Bernard Rix in *CIMC Raffles* as the leading authority on the purview doctrine: in a contract to build a dock, it would not permit substituting a cathedral for a dock. Nor, possibly, would it permit the extension of the works such as would double the financial liability. That indication was treated as being of some importance by Sir Bernard Rix in *CIMC Raffles* as supporting a "powerful" argument that the amendment in the *CIMC Raffles* case itself (although resulting in an increase of 40% or more) fell within the general purview of the guarantee, albeit (as indicated above) no decision was ultimately reached on the issue.

Additional practical guidance may also be derived from the facts of the first instance decisions in (i) *The Nefeli* (extension of a 12-month charter for a further year would have been outside the purview of the guarantee, had there been one; but the exercise of an option contained in the original agreement to renew for 12 months "might very well not"); and (ii) *The Kalma* (extension of a minimum 2-month charter so as to add a further 6/8-month trip and the subsequent grant of an option of a further voyage were "so fundamental that they could not properly be described as a variation at all").

Broadly speaking, therefore, the greater the increase or change the greater will be the risk that it will be found to be outside the terms or (if different) general purview of the original guarantee such that the guarantor's additional consent or even guarantee should be (or have been) obtained.

In the absence so far of categoric guidance from the courts, it is difficult to be any more precise at this stage. It is to be hoped further guidance will be provided by the courts sooner rather than later, if not in the *CIMC Raffles* case, then in some other.

An IP's investigation and litigation privilege

Stephen Akers of Grant Thornton UK LLP looks at recent developments in relation to litigation privilege and investigations by Insolvency Practitioners

Regular readers of this Digest will remember that the last two editions have carried case reviews of Rawlinson and Hunter Trustees and ors v (1) Stephen John Akers (2) Mark McDonald, first in respect of the hearing before Mr Justice Eder and then in front of the Court of Appeal.

Mark McDonald and I are liquidators of the Oscatello Group of companies, which operated under the umbrella of a trust the beneficiaries of which are Robert Tchenguiz, his wife, his children and remoter issue. The companies had borrowed large sums of money, in excess of £1bn, from Kaupthing Bank hf ("Kaupthing").

The Serious Fraud Office ("SFO") launched an investigation into the involvement of Robert and Vincent Tchenguiz in Kaupthing's collapse. Knowing of our appointments in respect of Oscatello and other related companies the SFO naturally came knocking on our door looking for relevant information.

The Liquidators had from the commencement of their appointments known that they would need to investigate and pursue litigation in order to make recoveries against parties connected with the affairs of the companies. The affairs of the companies were complex, involving very large commercial investments, substantial funds flows and a management structure through a Jersey Trust, run by Guernsey trustees advised by a company run by the primary beneficiary, Robert Tchenguiz. Not surprisingly, therefore, we sought the assistance of our forensic colleagues within Grant Thornton UK LLP ("GT").

The Liquidators commissioned five reports the dominant purpose of which was to identify claims they had in mind against available targets in 2009. It was these five reports that the SFO were allowed to read, but not copy, in

The Liquidators had from the commencement of their appointments known that they would need to investigate and pursue litigation in order to make recoveries…."

compliance with their request for information through Notices issued under Section 2 of the Criminal Justice Act 1987. It transpires that extensive notes of the reports were taken and relied upon by the SFO in obtaining search warrants against the Tchenguiz brothers.

When those search warrants issued by HHJ Worsley were subsequently quashed and consequent proceedings commenced against the SFO by the Tchenguiz brothers for damages we found ourselves in the middle of that dispute. In particular, when they became aware that the notes of the Liquidators' reports were relied upon by the SFO to obtain the search warrants, the Tchenguiz brothers made a third party application against us for disclosure of the five reports believing there to be a smoking gun.

This application was of serious concern to us as Liquidators as the reports summarised the status of our knowledge of evidence supporting actual litigation underway in Guernsey and of claims we were formulating elsewhere. We therefore, had no choice but to resist the applications made for their disclosure relying on litigation privilege.

At first instance, Mr Justice Eder found against the Liquidators as he did not believe

THE TCHENGUIZ BROTHERS MADE A THIRD PARTY APPLICATION AGAINST GRANT THORNTON FOR DISCLOSURE FOLLOWING AN INVESTIGATION BY THE SFO. ROBERT TCHENGUIZ' OSCATELLO GROUP OF COMPANIES HAD BORROWED MORE THAN £1 BILLION FROM KAUPTHING (TOP)

STEVE AKERS. AN IMPORTANT REALITY OF A LIQUIDATOR'S ROLE IS THAT HE OR SHE WILL NOT INSTRUCT A FORENSIC INVESTIGATION SIMPLY FOR THE SAKE OF IT

there was sufficient evidence that the Reports had been produced for the dominant purpose of aiding actual or contemplated litigation, as opposed to having been produced for the general purpose of assisting the Liquidators in discharging their statutory duties to investigate the companies' affairs.

The decision, subsequently confirmed by the Court of Appeal, raises interesting practical issues for insolvency practitioners and [by extension] questions of public policy around the statutory powers given to them. If it wasn't obvious before this case, then it should be obvious now that an insolvency practitioner when investigating and preparing legal claims is in no better position than an ordinary litigant. Unless the practitioner takes appropriate steps, anything he or his forensic colleagues write down or record electronically will potentially be subject to disclosure to parties to litigation (or third parties with an appropriate interest) in respect of any legal claims the practitioner might commence or become involved in as a third party.

Given the decisions made in this case it now seems highly likely that in future, defendants of insolvency related litigation will take an early opportunity to test the 'Privilege Log on disclosure' as to whether or not the practitioner has adequately protected litigation privilege over investigation work that led to the bringing of the claim.

No doubt we all have forensic colleagues with "brains the size of a planet", but relying on their memory and mental analytical capabilities has never been the right way to approach the preparation of a legal claim. Committing facts, analysis and conclusions to some form of report or summary paper is an important part of the process. It allows others in the team to

An insolvency practitioner when investigating and preparing legal claims is in no better position than an ordinary litigant

It is not enough to simply mark papers as "Confidential – Prepared in contemplation of litigation" or some variation of that theme

review, challenge the views formed and input additional material.

So how do you assert and protect litigation privilege in respect of the material produced as part of the forensic investigation that leads to the filing of a legal claim? It would perhaps be a bit cheeky of me I think to set out practical answers in this article when you should be instructing someone at South Square to advise you on this topic!

One clue I will give though, is that it is not enough to simply mark papers as "Confidential - Prepared in contemplation of litigation" or some variation of that theme. An insolvency practitioner will have to be able to demonstrate that when he commissioned the work that led to the Report he did so with the dominant purpose of specific litigation in mind, not just the possibility of litigation at some time in the future.

This of course leads to the immediate thought that you have to have made up your mind who you might want to sue and on what basis before you commission the forensic work. That is an interesting "cart and horse" conundrum, but one which also raises another interesting conflict of issues for an insolvency practitioner. How does the use of statutory compulsive powers, such as S236IA, fit in with this? The thought process will also need to be documented. Nor will involving lawyers to invoke legal professional privilege amount to much of an "invisibility cloak".

Whilst one or two exceptions have developed over the years, it is still a basic principle that the insolvency practitioner should not have already decided to litigate against a party before deploying S236 against that party. Clearly there is the potential for getting into a muddle between meeting the basic requirement of justifying S236, against a director for instance, and maintaining litigation privilege over any work product relating to a claim against that director. Use S236 before writing anything down about the claim? Not very realistic or practical I suggest.

In the meanwhile, there does seem to be the need to clarify some judicial misconceptions. An important reality of a liquidator's role is that he or she will not instruct a forensic investigation simply for the sake of it. That would be entirely inappropriate and a waste of creditors' money. In practice there is almost always a specific purpose that causes the forensic investigation to be necessary and this is more often than not because the practitioner knows enough on appointment to have the bringing of legal claims at the forefront of his mind. But that may not be a sufficiently dominant purpose.

One exception to this reality is where the company's books and records have been "mislaid" and a reconstruction of the balance sheet from third party sources is necessary in order to identify recoverable assets. However, in my view, it is arguable that the insolvency practitioner almost always has in mind when instructing a forensic investigation the "dominant purpose of contemplated litigation". So what is wrong with a presumption of that in the insolvency practitioner's favour?

That would certainly help with the s236 point and make more sense from a public policy point of view, given that Parliament clearly intended that insolvency office holders should have exceptional powers to investigate and compel the giving of information for the purposes of recovery of assets and the bringing of claims.

Steve Akers is a partner in the Recovery & Reorganisation practice of Grant Thornton UK LLP. He has been described as one of the World's leading professionals for large, complex finance and fraud-related insolvencies by Global Turnaround Magazine.

Court of Appeal clarifies *HMRC v Holland*

Henry Phillips reports on the recent Court of Appeal decision in *Smithton v Naggar*, where the Court had to consider de facto and shadow directorship and Section 190 of the Companies Act 2006

In last year's August edition of the Digest, I reported on the first instance decision of Mrs Justice Rose in *Smithton v Naggar* [2014] 1 BCLC 602. The Court of Appeal unanimously upheld that decision in a judgment handed down in July this year, giving further guidance on *de facto* and shadow directorships as well as on the ambit of Section 190 of the Companies Act 2006 ("**Section 190**").

Background

Dawnay Day was founded in 1928 by two army officers, Major Julian Day and General Guy Dawnay. By the mid-1980 it had been acquired by French financier, Guy Naggar. Together with Peter Klimt, Guy Naggar built a vast empire made up of property and financial interests. At its height the Dawnay Day group was said to be worth over £1 billion.

The Dawnay Day group included Dawnay Day International ("**DDI**") and its subsidiary, Dawnay Day Brokers Limited (subsequently renamed Hobart Limited and Smithton Limited ("**Hobart**"). Hobart was incorporated as a joint venture company founded by Mr Naggar and Barry Townsley ("**Mr Townsley**"), an old friend of Mr Naggar's. Together, Mr Naggar and Mr Townsley set about building Hobart into a broking business designed to effect contracts for difference ("CfDs") and share acquisitions for clients under the umbrella of the Dawnay Day Group. Mr Naggar was a director of DDI. He was never appointed as a director of Hobart.

The Dawnay Day Group collapsed in the shockwaves sent out from the Global

Dawnay Day was founded in 1928 by two army officers, Major Julian Day and General Guy Dawnay...

HENRY PHILLIPS

Financial Crisis in 2008, and which also led to the collapse of Lehman Brothers and the failure of the Icelandic banks, brought down in part by margin calls on CfDs which had been entered into in relation to shares in Foreign & Colonial Management Plc ("**F&C**"), many of which had been entered into with Hobart.

Hobart's Claims

When the Dawnay Day group collapsed, Mr Townsley acquired Hobart. Hobart did not bring proceedings against its counterparties to the CfDs in relation to F&C (which included companies owned and controlled by Mr Naggar and his family). Instead, in January 2011 Hobart commenced proceedings against Mr Naggar personally. Hobart alleged that Mr Naggar had been a *de facto* or shadow director of Hobart, that he had been in breach of his duties in causing Hobart to enter into the CfDs and was responsible for Hobart's

THE GLOBAL FINANCIAL CRISIS CLAIMED LEHMAN BROTHERS (RIGHT), THE ICELANDIC BANKS AND DAWNAY DAY

losses. Hobart claimed some £4.7 million from Mr Naggar, together with costs and interest.

Hobart also made an alternative claim from the outset, under Section 190 of the Companies Act 2006. Section 190 prohibits a company from entering into an arrangement with a director of the company or of its holding company (here, DDI), or a person connected with such a director, whereby the director "*acquires or is to acquire*" from the company (directly or indirectly) a substantial non-cash asset unless the arrangement has been approved by a resolution of the members of the company or is conditional on such approval being obtained. It also prohibits such an arrangement where the company "*acquires or is to acquire*" a substantial non-cash asset from such a director or a connected person unless the arrangement is approved by a members'

Hobart alleged that entering into CfDs was a breach of Section 190 of the Companies Act 2006 (substantial property transactions)

resolution or is conditional upon such resolution being obtained.

Hobart alleged that the entering into the CfDs was a breach of section 190. Hobart put its case in two ways. First it was put on what was described as the "narrow basis". Hobart alleged that the mechanism by which the CfDs were created over the course of the trading involved the transfer of property rights or interests in shares between Hobart and either Mr Naggar or one of his companies and then later on the same trade day, the transfer of those rights or interests back to Hobart. Second, it was put on what was described as the "wider basis". Hobart alleged that, as a counterparty to a CfD would ordinarily be given an opportunity to purchase the underlying securities on termination of the transaction, the overall arrangement under which Hobart opened the CfDs for Mr Naggar's companies was an arrangement whereby Mr Naggar or a connected company "*acquires or is to acquire*" the underlying securities.

Shortly before the commencement of the trial, Hobart added a third cause of action in respect of allege misrepresentations and / or misstatements concerning the financial position of the Dawnay Day group in 2008.

The First Instance Decision

At the trial, Mr Naggar was represented by Michael Crystal QC, David Alexander QC, Tom Smith and Charlotte Cooke. Hobart was represented by Philip Marshall QC and Jonathan Adkin QC.

On 11 July 2013, Mrs Justice Rose handed down judgment ([2014] 1 BCLC 602). She concluded that "*all three limbs of Hobart's claim against Mr Naggar fail and the claim is dismissed*".

As regards the claim for breach of director's duty, Mrs Justice Rose (following a review of the case law on *de facto* and shadow directors) referred to the fact that Mr Naggar wore a number of hats in his dealings with Hobart in 2007 and 2008. For example, he was a *de jure* director and chairman of DDI as well as being a major client of Hobart through his private companies. Mrs Justice Rose went on to say that (1) the case law indicates that the

GUY NAGGAR (ABOVE) AND WITH PETER KLIMT (RIGHT)

identification of the hat which the individual was wearing in his dealings with and for a company is crucial in determining whether he is a *de facto* or shadow director and (2) hat identification was therefore an important legal qualification to the general principle that one must look at what the putative director actually does rather than how he is

The Court of Appeal dismissed the appeal on both issues … But it gave clarification of the ratio in *HMRC v Holland*

described when deciding whether to impose fiduciary duties on that director. The Judge held that the acts of Mr Naggar relied upon by Hobart were either of no consequence or explicable on the basis of one or other of the alternative hats that he was wearing and that the evidence fell "*far short of showing that Mr Naggar was involved in the management of Hobart after it became a separate company*". In relation to shadow directorship, she concluded that there was "*no evidence*" that the majority of the board were accustomed to act in accordance with Mr Naggar's instructions.

As regards the claim under section 190, having heard expert evidence on the issue the Judge held that the mechanism used to create CfDs did not involve the creation of a proprietary interest on the part of Mr Naggar or his companies and did not therefore involve the acquisition of an asset. She therefore rejected the "narrow basis" of the claim. In relation to the "wider basis" the Judge accepted the submission of Michael Crystal QC to the effect that a person should not be taken to have acquired or agreed to acquire an asset unless there is a high degree of certainty at the time when the arrangement is entered into that the asset will be required. She held that the most that could be said in relation to the CfDs was that Mr Naggar "*might at some future point*" acquire the underlying securities and that section 190 was not engaged.

Hobart sought and obtained permission to appeal.

The Appeal

At the appeal, Mr Naggar was represented by Michael Crystal QC, David Alexander QC, Tom Smith and Professor Dan Prentice. Hobart was represented by Philip Marshall QC and Mary Stokes.

As regards the claim for breach of director's duty, Hobart sought to overturn the Judge's decision on the grounds that, among other things, the Judge wrongly focussed on "hat identification", rather than on ascertaining the corporate governance system of Hobart and, further, wrongly proceeded on the basis that, if a person could possibly have acted wearing some other hat than that of director, his acts should be attributed to the role represented by that hat. As regards the Section 190 claim, Hobart focussed on the "wider basis" and submitted that section 190 should be interpreted so as to cast the net widely, in order to achieve its statutory purpose. On that basis, Hobart submitted that section 190 was engaged if there was a "real prospect" that the connected person would opt to take the shares on the closing out which, it was submitted, was true in the present case.

The Court of Appeal dismissed the appeal on both issues. The Court held that the question of whether or not Mr Naggar was a *de facto* or shadow director was a question of fact. The Judge did not err in principle when approaching that question and there was no basis for setting aside the Judge's finding. As to the Section 190 claim, the Court of Appeal held that whether or not a person has entered

There was no basis for interpreting the words "is to acquire" in Section 190 as "may acquire"

into an arrangement pursuant to which he acquires or is to acquire non-cash assets of the requisite value falls to be determined at the point when the arrangement was entered into. There was no basis for interpreting the words "*is to acquire*" as "*may acquire*" and since there was no certainty that on closing out the CfD holder would opt to acquire the underlying securities, Section 190 did not apply. In giving that judgment, the Court of Appeal said a number of things worth noting.

Clarification of the ratio in *HMRC v Holland*

The leading case on *de facto* and shadow directors is the decision of the Supreme Court in *HMRC v Holland* [2010] 1 WLR 2793, where the Supreme Court (by a majority) decided that Mr Holland, a director of a corporate director, which was the sole director of some 43 trading companies, was nonetheless not a *de facto* director of those other companies. He had acted only in his capacity as a director of the corporate director.

In *Holland*, Lords Hope and Collins reached the same conclusion albeit by different reasoning. Lord Hope treated the separate corporate personality of the corporate director as the key consideration and held that as long as the relevant acts are within the ambit of the discharge of a person's duties and responsibilities as director of a corporate director, "*it is to that capacity what his acts must be attributed*" (emphasis added). Lord Collins, by contrast, held that the relevant question was whether a person was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were a director. Lord Saville agreed with both Lord Hope and Lord Collins, Lords Walker and Clarke dissented. The Court of Appeal held that as Lord Clarke had agreed with Lord Collins' analysis of the law (reaching a different conclusion on the facts), the *ratio* of *Holland* is to be found in Lord Collins' judgment.

Practical Points: what makes a person a de facto director?

The question whether a director is a *de facto* or shadow director is a question of fact and degree. The question is whether he was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were a director. Nevertheless, the Court of Appeal set out a number of helpful practical points of general importance (see [33] – [45]):

(1) the concepts of shadow director and *de facto* director are different but there is some overlap;

(2) a person may be a *de facto* director even if there has been no invalid appointment. The question is whether he assumed responsibility to act as a director;

(3) in answering that question, the court may have to determine in what capacity the director was acting (i.e. the "hat" question);

(4) the court will, in general, also have to determine the corporate governance structure of the company so as to decide in relation to the company's business whether the director's acts were directorial in nature;

(5) the court is required to look at what the director actually did and not any job title actually given to him;

(6) a defendant does not avoid liability if he shows that he in good faith thought he was not acting as a director. The question whether or not he acted as a director is to be determined objectively and irrespective of the defendant's motivation or belief;

(7) the court must look at the cumulative effect of the activities relied upon;

(8) it is necessary to look at the acts in their context. A single act might lead to liability in an exceptional case;

(9) relevant factors include whether the company and / or third parties considered him to be a director and whether he was held out as such;

(10) the fact that a person is consulted about directorial decisions or his approval does not in general make him a director because he is not making the decision; and

(11) acts outside the period when he is said to have been a *de facto* director may throw light on whether he was a *de facto* director in the relevant period.

Any port in a storm

VILAMOURA'S TIVOLI MARINA HOTEL. VENUE FOR R3'S ANY PORT IN A STORM.

R3 conference Vilamoura, 14-16 May 2014.

South Square was well represented at the Vilamoura R3 conference on 14 to 16 May 2014: attendees included Mark Phillips QC, Mark Arnold QC, Glen Davis QC, Adam Goodison and Hilary Stonefrost.

The theme of "Any Port in a Storm" would have put the fear of a Portuguese God into any fisherman as the conference started with a graphic video of the winter storms crashing on the coasts and countryside of the UK. A good sales pitch for the rescue services provided by the turnaround profession who can man the lifeboats at any time of the day or night.

Then, introduced by Giles Frampton, R3 President, up stepped William Keegan and Nigel Lawson to debate the virtues and vices of the UK remaining in the European Union. This was an illuminating debate canvassing the horrors of the European World Wars against today's federalist states of Europe, and questioning where the European train was heading next and whether the destination was in the overall interests of the UK. Anyone brave enough to ask a question tended to be sharply corrected by the panel for being woefully informed and defeatist.

As the waves pounded from the Atlantic outside on the beach highlights of the first day's study continued by looking at the Thomas Cook Group restructuring, a session

R3 SPEAKERS INCLUDED GLEN DAVIS QC (LEFT) AND HILARY STONEFROST (BELOW) LORD LAWSON AND THE OBSERVER'S WILLIAM KEEGAN (BELOW LEFT). SOUTH SQUARE DELEGATES INCLUDED ADAM GOODISON (BOTTOM RIGHT)

on TUPE 2006 and employee issues, and a comprehensive update on caselaw from South Square (Glen Davis QC and Hilary Stonefrost). Then it was time to adjourn to the beach bar to taste Portuguese wines and cheeses, before the evening dinner in a tropical tent beside the beach.

The second day's study included a session on legal risks in the digital world, a session on privilege and disclosure, a review of consultations by the Insolvency Service (including the consultation on fee setting mechanisms), then onto the home straight with a high level review of some recent global restructurings, finishing with "Fog in the Channel – is the continent cut off?"

Then it was off to the beach for an enjoyable beach bar experience: Onde está a minha bebida.

R3's Annual Conference next year is taking place between 20 to 22 May 2015 – in Berlin. Wir sehen uns dort Baby.

RADISSON BLU HOSTED INSOL'S SEMINAR

WILLIAM WILLSON

William Willson reports from the INSOL International Channel Islands One Day Seminar

It has been a busy year in the INSOL calendar, with the one-day Caribbean conference in the Cayman Islands last November followed closely by March's three-day annual colloquium in Hong Kong. Both of these were well attended by Chambers, and a further six of us (Glen Davis QC, Mark Arnold QC, Tom Smith QC, William Willson, Adam al-Attar and Alexander Riddiford) jetted down to Jersey for the INSOL International Channel Islands One Day Seminar in mid-June.

This year's platinum sponsors were Bedell Cristin, Mourant Ozannes and EY.

The South Square contribution kicked off on the Wednesday afternoon with a seminar on "Trustees and Insolvency: Hot Topics" chaired by Bedell Cristin's Rob Gardner, and presented by Chambers' Glen Davis QC, Mark Arnold QC and William Willson. Attended by 40 professional trustees from both the Channel Islands and London, this focused on the decision of Sir John Chadwick in Investec Trust (Guernsey) Limited & Or v Glenalla Properties Limited & Ors (38/2013) and enforcement by creditors against insolvent trust funds.

We (and a further 10 lucky delegates) were then treated by Rob and his colleagues to a delicious dinner on the stylish seaside terrace at the Oyster Box in St Brelade's Bay, followed by drinks in the Royal Yacht Club (for which many thanks).

The conference proper was on the Thursday: a beltingly hot affair, and the first day of the World Cup. After a welcome by INSOL President James Sprayregen, in his opening remarks Bedell Cristin's Anthony Dessain reminded us of Jersey's importance in the financial world: the custodian of £1.2 trillion of assets, adding £9.6 billion to the UK economy per year.

In the opening seminar we were treated to "Asset-tracing and recognition of foreign office

holders" by Alex Horsbrugh-Porter (Mourant Ozannes), Mark Forte (Conyers Dill & Pearman), Karen Le Cras (Carey Olsen) and Fraser Robertson (Appleby Global), comparing and contrasting the different positions in Jersey, Guernsey and the British Virgin Islands. This was followed by a talk entitled "Insolvency of financial institutions", the highlight being Allen & Overy's Philip Wood QC, whose portentous proclamation that "insolvency is the start of everything" introduced a masterclass on the subject.

After lunch (sponsored by South Square), Glen Davis QC chaired "Credit, security and enforcement in the Channel Islands", a detailed, comparative analysis of the contrasting laws of taking and enforcing security in Jersey and Guernsey.

Next up was "Administrations in Guernsey are different: a comparison with UK and Guernsey", chaired by Grant Thornton's Alan Roberts and featuring Carey Olsen's Jeremy Garrood, Ben Larkin of Jones Day and Ogier's Matthew Newman. The final session, entitled "Current trends and new developments in the Channel Islands", looked at the role of the inherent jurisdiction of the Court, the prospects for consultation leading to a new insolvency law in Guernsey and the view from the Chief Minister's department (represented by James Mews).

SOUTH SQUARE SPONSORED THE LUNCH AT INSOL INTERNATIONAL IN JERSEY

Many thanks to Carey Olsen and Grant Thornton for treating us all to sunset champagne and a delicious three-course dinner in The Beach House Restaurant, St Brelade. There were after dinner speeches from Anthony Dessain and Carey Olsen's Marcus Pallot, as well as some well-received words by Senator Philip Ozouf (Treasury and Resources Minister for Jersey). Back in St Helier, FTP Advisory treated the conference survivors to one final round of drinks in The Drift.

It was great to see so many of you in Jersey, and we hope to catch up with you all at the next INSOL event in San Francisco.

Finally, many thanks again must go to Penny Robertson for organising another very successful conference.

The Islands that could - and do

Recent developments in Bermuda by **Robin Mayor**, of Conyers, **Kiernan Bell** of Appleby and **Andrew Martin** of MJM

Bermuda has long punched above her weight – home of the third largest reinsurance market in the world, the country has a global reach, providing a home to considerable intellectual capital and established expertise in providing first-class financial services. While Bermuda, like all financial centres, has suffered in the global financial crisis, Bermuda has not rested on her laurels, but instead is leveraging off her well-earned reputation for stability and strong regulation to create a compelling case for new markets looking for a home. This summary highlights what's new in Bermuda, in business, law reform and in the courts, with commentary from across industry sectors.

Highlights

Significant developments in the past twelve months in Bermuda have included:

■ An increase by over 17% in new incorporations in 2014 over 2013, the largest increase since 2008. Reporting to the Bermuda Legislature in March 2014, Minister of Education and Economic Development Dr Grant Gibbons stated "The figures speak for themselves. They show quantitative evidence that there is growth and renewed confidence in Bermuda as a place to do business".

■ Bermuda has successfully leveraged its regulatory environment and infrastructure to dominate the insurance and capital markets sector, developing insurance linked securities (ILS) and related bond products. Now known as the "the World's Convergence Capital" Bermuda is the market leader with the number of ILS listings on the Bermuda Stock Exchange reaching US$10.09 billion at the end of the first quarter in 2014, "which represents almost half the outstanding market for catastrophe reinsurance bonds," according to Greg Wojciechowski, Chairman of the Bermuda Stock Exchange. The number of ILS listings has grown to 83, as at the end of March 2014.

■ Merger and acquisition activity in 2014 increased by 51% compared to 2013, involving 96 transactions, with an average transaction size of US$111 million. "Bermuda companies acted as acquirers in 50 transactions worth US$22.22 billion, which marked the highest acquirer average deal value across jurisdictions, of over just US$400 million" according to Tim Faries, group head of Corporate Commercial at Appleby. There were 34 IPOs in the first quarter, worth a total of $11.7 billion, and the average of this quarter's IPO values has only been greater once before in the last decade.

■ Endurance Specialty Holdings Ltd is currently mounting a well-publicised hostile bid for the shares of Aspen Holdings Ltd for an acquisition price of US$3.2 Billion in cash and share equivalents.

■ In March 2014 Bermuda became home to the first African catastrophe insurance pool, a mutual established by several African nations to provide drought coverage for Kenyan, Mauretania, Mozambique, Niger and Senegal. Henry Rotich, Kenya's Cabinet Secretary for the National Treasury said: *"Droughts undermine our hard-won development gains, just as Africa is beginning to realise its vast potential. ARC will help build resilience among vulnerable populations, protect our agricultural investments, thereby increasing productivity, as well as promoting fiscal stability by preventing budget dislocation in a crisis."* Nigeria's Finance Minister OkojoIweala, Chairman of the ARC Agency Board, said "*It is an unprecedented way of organising ourselves with our partners, with Africa taking the lead—taking our collective destiny into our own hands, rather than relying on the international community for bailouts.*" The insurance policies issued by ARC will

provide approximately US$135 million in drought direct insurance coverage, and US$55 million in reinsurance cover. The structure is believed to be the first of many potential structures of a similar type which will be capable of bringing relief to populations in areas of the world which are prone to suffer from weather related disasters.

■ In April 2014 the US investment and advisory company FRMO Corporation acquired a 37.5% stake in the Bermuda Stock Exchange ("BSX"). "*Bermuda's honoured legal and regulatory environment is time tested, making it a very attractive country for offshore investors*", according to Murray Stahl, Chairman of The Elmsford, a New York based investment company, now the biggest shareholder in the BSX. The BSX is the leading electronic offshore securities market. The BSX is a full member of the World Federation of Exchanges, affiliate member of IOSCO and is recognised by the SEC as a Designated Offshore Securities Market; the UK FCA as a Designated Investment Exchange, the HK HM Revenue and Customs as a Recognised Stock Exchange. In addition it has approved Stock Exchange status under Australia's Foreign Investment Fund (FIF) taxation rules; and a Designated Exchange status by the Canadian Ministry of Finance.

Bermuda has successfully leveraged its regulatory environment and infrastructure to dominate the insurance and capital markets sector

■ London-based investment managers Securis Investment Partners LLP, the fifth or sixth largest ILS firm in the world, and the largest in London, established a physical presence in Bermuda in April 2014 to take advantage of Bermuda's dominant position in the ILS market and its ready access to North American markets. "*There is still plenty of room for growth—70 percent of catastrophe losses are uninsured*", says Mr Rob Procter CEO of Securis. "*We have a great business in London, but ultimately you have to be in Bermuda as well.*"

■ The Investment Funds Act 2006 (the "IFA") was recently amended to give qualified new and existing investment funds the option to register with the Island's integrated financial services regulator, the Bermuda Monetary Authority in one of two new exempted fund categories:

(i) Class A Exempt Funds ("Class A Funds"); or

(ii) Class B Exempt Funds ("Class

WATERLOO HOUSE: BERMUDA HAS NOT RESTED ON HER LAURELS, BUT INSTEAD IS LEVERAGING OFF HER WELL-EARNED REPUTATION FOR STABILITY AND STRONG REGULATION


ROBIN MAYOR OF CONYERS

B Funds").

The new exempt fund classes enable same day incorporation and regulatory certainty. Class A Exempt Funds (funds that have an investment manager regulated by the BMA, or a recognised regulator (such as the SEC) or have at least $100 million in assets under management) can launch the same day as filing the exemption notification with the BMA. A secondary option of Class B Funds similarly preserves flexibility and speed for fund managers that do not meet the Class A Funds requirements. The bottom line is that Bermuda provides fund and asset managers with the option to create an investment fund in a stable jurisdiction with a blue chip reputation quickly and cost effectively.

■ Bermuda has recently established the Bermuda Business Development Agency ('BDA') (www.bermudabda.com) a centralised non-profit corporation aimed at growing and developing Bermuda's international business. The BDA supports and provides a framework for collaboration between industry and government to drive economic growth and provides strategic direction to the jurisdiction's efforts.

■ Bermuda's Offshore financial services industry directly or indirectly supports over 100,000 jobs in the UK, and 355,000 jobs in the US.

Tax Information Exchange Agreements

To date, Bermuda has signed 41 Tax Information Exchange Agreements (TIEAs) with various countries globally, with more under negotiation, including every member of the EU that is a signatory to the Multilateral Convention on Mutual Assistance in Tax Matters, with the exception of Greece, Lithuania, Romania, Slovenia, and Spain. Bermuda most recently signed a TIEA with Poland in November 2013, and has concluded negotiations and is awaiting signature of TIEAs with Greece and Spain.

The legislation underlying the enforcement of TIEAs in Bermuda was modified in 2013 to make court challenges to production orders simpler and speedier.

Bermuda's business model values the benefits of compliance with international standards and international cooperation on crime, regulatory and tax matters.

"It is clear Bermuda is not a tax haven ... Bermuda's main financial services are about the provision of high-quality, good value, well-regulated and well-regarded insurances and reinsurances to the wider world"

said Governor of Bermuda, George Fergusson, in an interview with Insurance Day in June 2013.

FATCA

Bermuda negotiated and entered a Model II IGA with the United States on FATCA (the Foreign Account Tax Compliance Act) determining that this best meets the interests of the financial services industry and the country. The Model II IGA with the US requires financial institutions in Bermuda to identify and annually report information about US persons directly to the IRS. Bermuda is not the only international financial centre to adopt a Model II approach – Hong Kong recently followed Bermuda, Switzerland and Japan in negotiating an IGA Model II. The Bermuda Government also negotiated and entered a Model II IGA with the UK government. The advantage is that unlike a Model I IGA, the Bermuda Government will not be required to introduce extensive legislation or regulations. As such Bermuda-based FFIs currently have all that they need to take steps to comply with the requirements of FATCA. This should reduce costs and ensure that Bermuda based FFI's have direct control over data and where and to whom it is reported.

Multilateral Convention on Mutual Administrative Assistance in Tax Matters

In addition, Bermuda became a signatory to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters in March 2014, which has over 60 participating countries. This greatly expands Bermuda's reach, and enables the authorities in Bermuda to co-operate with a much wider number of onshore jurisdictions. In an era of transparency in tax matters, multilateral participation in tax matters is seen as essential to develop trade and commercial links with all major onshore financial centres.

Legislative Reform

The BDA through its Corporate & Commercial Legislative Change Committee, and the Trust Legislative Change Committee, has sponsored proposals for law reform intended to maintain Bermuda's reputation as a modern, relevant, innovative and well -regulated jurisdiction. Amendments to the Investment Business Act 2006 establishing new solutions for same-


BERMUDA'S SESSIONS HOUSE

day investment fund formations, and removing regulatory uncertainty, have been implemented, making Bermuda more attractive as a domicile to investment managers and investment funds. A recent amendment to the Companies Act has added flexibility for companies wishing to alter their capital structure and an amendment to the Life Insurance Act makes it clear that the Act will apply to life policies expressed to be governed by Bermuda Law, even if made outside the jurisdiction. Future amendments to Partnership and Trustee legislation are in the pipeline to respond to the needs of international commerce.

Trusts (Special Provisions) Amendment Act 2014

A new Act has been passed to amend the existing law in Bermuda to clarify and expand the extent to which a settlor may reserve powers to himself. These powers now include the power to revoke the trust, amend or advance or distribute trust property (amongst others), and it is expressly provided that such powers shall not invalidate the trust or prevent it taking effect according to its terms or cause the property to revert to the estate of the settlor. This is to make the use of Bermuda trusts more flexible and to correspond more closely with the wishes and expectations of certain prospective settlors to whom a greater say in the management and application of trust assets may be a determining factor in the decision to settle a trust.

The Regulator

In addition, Bermuda's regulator, the Bermuda Monetary Authority ("BMA"), continues to enjoy its well-deserved reputation as a blue chip regulator of a significant international financial centre. The BMA is a full member of the International Organization of Securities Commissions (IOSCO) and a founding member of the International Association of Insurance Supervisors (IAIS).

In more recent news, the BMA entered a Memorandum of Understanding with Germany's financial regulator, the Federal Financial Supervisory Authority (BaFin), in relation to the European Union's Alternative Investment Funds Manager's Directive (AIFMD). This is the BMA's 27th accord under the AIFMD, which provides for mutual assistance between supervising managers of alternative investment funds who operate on a cross-border basis in their respective jurisdictions. The fact that the BMA has entered so many accords with other regulators is testament to the BMA's international reputation. MOUs such as this enable Bermuda-based fund managers to market their products in these jurisdictions. CEO of the BMA, Jeremy Cox said: "*Marking this milestone also serves to reinforce Bermuda's competitive position as a jurisdiction that can accommodate a full spectrum of fund-related activity within an internationally recognised regulatory framework*".

Bermuda's Commercial Courts

Bermuda has a designated commercial court with experienced commercial judges who routinely consider cases of considerable complexity and significance. The commercial court judges (presided

Members of Chambers who have advised in relation to cases in Bermuda in the last 5 years

Michael Crystal QC
Gabriel Moss QC
Richard Sheldon QC
Richard Hacker QC
Robin Dicker QC
William Trower QC
David Alexander QC
Barry Isaacs QC
Felicity Toube QC
Mark Arnold QC
David Allison QC
Richard Fisher
Stephen Robins
Marcus Haywood
Henry Phillips

Judges of the Court of Appeal
The Rt. Hon. Edward Zacca OJ, President
The Rt. Hon. Sir Anthony Evans
The Rt. Hon. Sir Robin Auld
The Rt. Hon. Sir Scott Baker
The Rt. Hon. Patricia Dangor
The Rt. Hon. Sir Maurice Kay

Supreme Court Judges
Hon. Chief Justice Dr Ian Kawaley
Hon. Mrs Justice Norma Wade-Miller
Hon. Mrs Justice Charles-Etta Simmons
Hon. Mr Justice Carlisle Greaves
Hon. Mr Justice Stephen Hellman

Assistant Justices
Narinder K. Hargun
John Riihiluoma

over by Bermuda's well known Chief Justice Dr. Ian Kawaley) is known for robust but equitable case management for matters listed before the court, resulting in speedy hearings and promptly rendered decisions. Recently the Bermuda Courts at both the Supreme Court and the appellate level have issued a number of significant decisions at least two of which are subject to appeal to the Judicial Committee of the Privy Council, Bermuda's highest appellate court which sits in London, England. Many of these cases are attracting international attention as the decisions involve matters of important legal principle which will create precedent in other offshore common law jurisdictions.

Trust Cases

In the Matter of an Application for Information About a Trust [2013] CA (Bda) 8
The case concerned disclosure of information in relation to a Bermudian trust and the court's role when the trust deed contained a disclosure mechanism. The trust deed contained a provision requiring the consent of the protector to disclosure. The protector, who was also one of the beneficiaries, had refused to provide her consent to disclosure sought from the trustee by another beneficiary. The Supreme Court of Bermuda and Bermuda Court of Appeal decided that the court retained the power, by virtue of its overriding supervisory jurisdiction, to order disclosure notwithstanding the disclosure mechanism. The case is subject to an appeal to the Privy Council.

Stiftung Salle v Butterfield Trust [2014] Bda LR 13
This case concerned the giving of money to fund the construction of a new opera house for Lucerne, Switzerland. The court's decision was that, as a matter of Swiss law, a valid and enforceable contract existed to provide money to fund the construction of the opera house, although various claims under Bermuda trust law were rejected. The case is important primarily for the (obiter) finding that litigation funding agreements are valid and enforceable in Bermuda and the tentative (and again obiter) finding that funding costs are not recoverable from the defendant as damages.


ANDREW MARTIN OF MJM

GHIJ v KL & Others [2011] SC (Bda) 23
This case was the first reported decision on s 47 of the Trustee Act 1975. That section provides the court with jurisdiction to provide trustees with additional powers over and above those in the trust deed or otherwise provided by statute. This case clearly establishes that s 47 is wider in scope than the English equivalent jurisdiction contained in section 57 of the Trustee Act 1925 in that the Bermuda court has the ability to provide a trustee with a power which has the effect of varying the beneficial interests. This can be achieved with representative beneficiaries before the court and without requiring the consent of the whole beneficial class.

In the ***Matter of A Trust*** [2012] SC (Bda) 72 Civ
This case is one of a small number of cases in common law jurisdictions which have considered jurisdiction clauses in trusts. The clause in question in this case was in terms which are very common in Bermuda trusts, namely that the "forum of administration shall be the courts of Bermuda". After a careful review of the case law from other jurisdictions, the Chief Justice held that this clause conferred exclusive jurisdiction on the Bermuda court in respect of the dispute in question, which was an attempt by a beneficiary to launch proceedings in an onshore jurisdiction seeking information about the trust. It also appears from this judgment that such an exclusive jurisdiction clause is wide enough to encompass breach of trust actions. On the facts, the Bermuda court granted an anti-suit injunction against the beneficiary.

KIERNAN BELL OF APPLEBY

In ***Re ABC Trust*** [2012] SC (Bda) 65 Civ,

The perpetuity period in Bermuda was abolished prospectively (save for trusts of Bermuda land) by the Perpetuities and Accumulations Act 2009. The question arose whether trusts created before abolition could take advantage of the new law. In the ABC Trust case, the court was prepared to exercise its powers under section 47 of the Trustee Act to give a trustee the power to amend an existing trust which had the effect of extending the existing perpetuity period thus taking advantage of the 2009 Act where this was expedient in the interests of the trust. This decision shows the willingness of the Bermuda court to be flexible and ensure that trusts are administered on a modern and efficient basis.

Cross-border insolvency

PwC v Saad Investments Company Limited and Singularis Holdings Limited (2013) CA (Bda) 7 Civ

International insolvency has also been at the forefront of litigation news with the ***Saad Investments Company*** and ***Singularis Holdings*** cases being heard by the Privy Council in May 2014. A judgment is expected shortly which will clarify Bermuda's insolvency laws, and determine the extent to which the Bermuda court has power to recognise foreign liquidators and allow them to exercise their powers within Bermuda.

The background to the case is the fact that Bermuda legislation does not contain provisions similar to those in section 426 of the English Insolvency Act 1986 expressly permitting assistance to be given to a foreign liquidator. Accordingly, the Bermuda courts have had to be creative in dealing with the effects of foreign liquidations in Bermuda and adapt the common law. A line of local case law in recent years following *Cambridge Gas* established that the Bermuda courts have jurisdiction at common law to assist foreign liquidators and to make production orders against people in Bermuda in aid of a foreign liquidation.

Saad Investments Company and ***Singularis Holdings*** were both Cayman companies that had been wound up in the Cayman Islands. In addition, an ancillary winding up order had been made in Bermuda against ***Saad Investments Company*** (on the basis that it was doing business in Bermuda). ***Singularis Holdings*** was not wound up in Bermuda. The liquidators, having obtained the books and records of the companies from the auditor in Cayman (where the statutory compulsive powers did not enable them to obtain the auditor's working papers), then sought production orders in Bermuda to obtain copies of the auditor's working papers. The auditor was a Bermuda exempted partnership, doing business in Dubai.

The Bermuda Court of Appeal held that there was no jurisdiction under the common law of Bermuda to make a production order in aid of a foreign liquidation against people in Bermuda.

By a majority, the Court of Appeal held that the defendant auditor was unable - in the case of ***Saad Investments Company*** - to challenge the making of the ancillary winding up order in Bermuda, on the ground that the challenge was out of time. Because the Bermuda court had made an ancillary winding-up order that could not be challenged, the court had statutory jurisdiction to make a production order against the auditor in Bermuda and accordingly ordered production of the auditor's working papers.

Auld LJ expressed the view that there was a pressing need for reform to give effect to a more comprehensive system of co-operation in cross-border insolvency cases.

The appeal was heard by the Privy Council in May 2014, and a decision is expected imminently.

Members of Chambers who have appeared in court in Bermuda or in appeals to the Privy Council from Bermuda in the last 5 years

Gabriel Moss QC
Richard Sheldon QC
Richard Hacker QC
Robin Dicker QC
David Alexander QC
Felicity Toube QC
Stephen Robins

Barry Isaacs QC has also appeared in an arbitration under the Bermuda Arbitration Act.

Professional Associations

Bermuda's professional organisations are still growing to meet the demands of international business. The Bermuda Bar Association now has 458 members, the Bermuda Institute of Chartered Accountants has 726 members, the Bermuda Branch of the Society of Trusts and Estates Practitioners (STEP) has 238 members, and the local chapter of the Institute of Directors has 118 members, representing a tripling in growth in membership over the last 18 months.

What kind of disputes will keep us busy over the next few years?

Alex Potts of Sedgwick Chudleigh predicts the future in Bermuda

Introduction

On 16 August 1964, Isaac Asimov published an essay predicting what the world would look like in 2014, fifty years later. Amongst other things that he predicted (which did not include any World Cup scores), he foresaw (as has arguably come to pass) that:

- Gadgetry would continue to relieve us of tedious jobs;
- A good beginning would have been made in the colonization of the continental shelves; and
- We would suffer badly from the disease of boredom: in a society of enforced leisure, the most glorious single word in the vocabulary will have become "work".

Isaac Asimov was a longtime fan of Bermuda (attracted, no doubt, by the Bermuda Triangle), and he is reported to have given astronomical lectures on the island (where both the sea and the sky are beautifully clear).

With Asimov in mind, therefore, this article will predict the kinds of disputes that are likely to keep lawyers, judges, and arbitrators busy in Bermuda over the next 5 (not 50) years. I understand that other contributors have already surveyed the 400 odd years of Bermuda's legal history to date, or that readers will be familiar with it in any event.

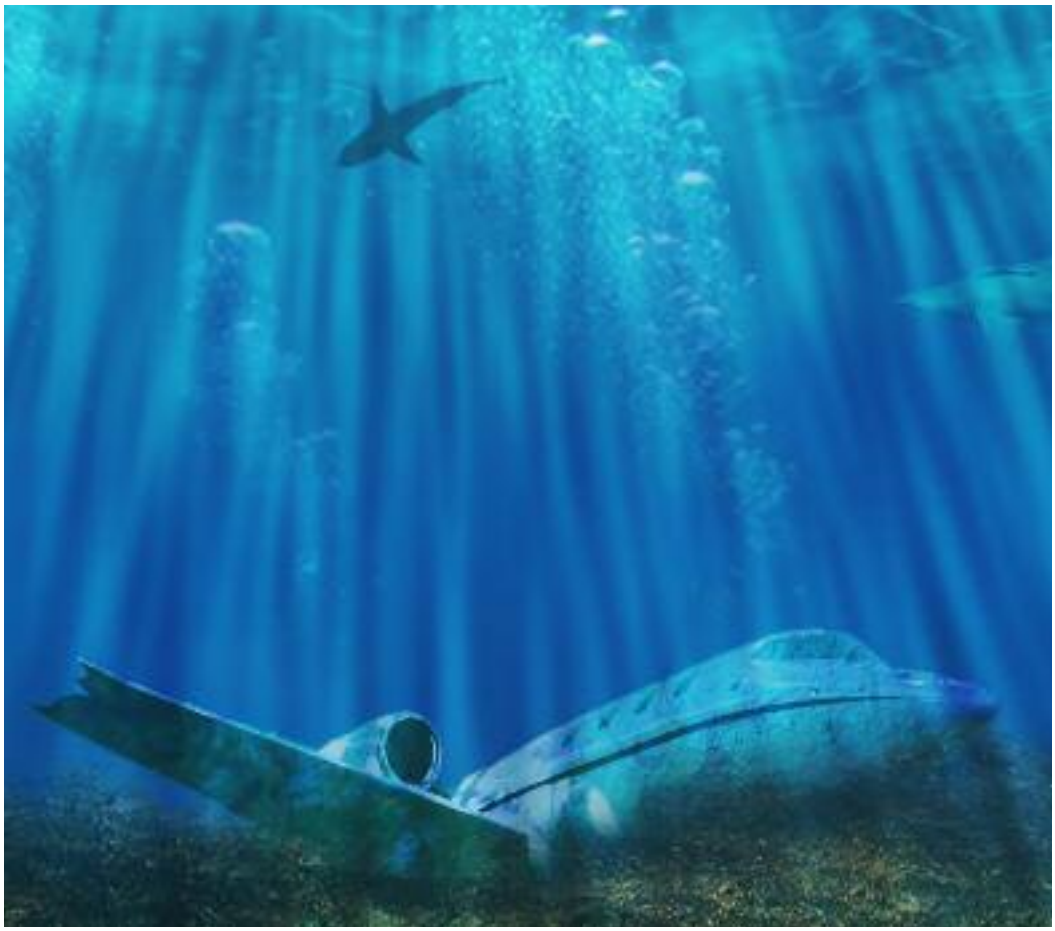
Gadgetry will continue to relieve us of tedious jobs

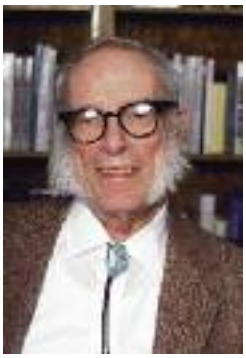
One of Bermuda's recent success stories has been the growth of Insurance Linked Securities, collateralised reinsurance products and related financial services (including Catastrophe Bonds, Sidecars, Industry Loss Warranties, Segregated Accounts Companies, SPVs/SPIs, ILS funds, and hedge-fund backed reinsurers), as the capital markets and insurance markets have converged.

The growth has been credited to a combination of the non-correlated (and attractive) returns associated with insurance and reinsurance products compared to other asset classes in recent years; Bermuda's Insurance Amendment Act 2008, which introduced a flexible regulatory regime in 2009 that was specifically designed with ILS products in mind; and the island's

Bermuda: a jurisdiction where the future is bright and clear

ANDREW MARTIN OF MJM





ISAAC ASIMOV (ABOVE) WAS AN ACCURATE SEER AND WAS PARTICULARY DRAWN TO BERMUDA NOT LEAST OF ALL DUE TO ITS INFAMOUS TRIANGLE

combination of broking, underwriting, actuarial, investment management, fund administration, and legal professional services.

Other incentives for market participants have included the fact that payments under catastrophe products have moved away from traditional indemnity/proof of loss requirements, and they have largely become trigger-based, with triggers often calculated by reference to indices calculated and published by independent index service providers. They are designed, in theory, to result in greater speed, transparency, and certainty of outcome (whether that is a payment to the policyholder or a return of capital to investors), with less likelihood for dispute and delay than can be the case in traditional insurance/reinsurance contracts.

What I predict, however, is a substantial growth in ILS-related disputes in Bermuda over the next 5 years.

On the investor/shareholder/fund side, as soon as a serious catastrophe strikes, there will be a surge of the sorts of claims that arise when fund investments perform less profitably than anticipated (including claims of fraud, misrepresentation, prospectus misstatement, minority oppression, mismanagement, and breach of fiduciary duty).

On the insurance/reinsurance/derivative contract side, there will be a growth in disputes as to the interpretation and application of trigger wordings (not all of which are tightly drafted), and their relationships with any chosen index or indices, as well as avoidance arguments based on misrepresentation and non-disclosure (although it remains uncertain whether a duty of utmost good faith applies to the placement of these products).

On the collateral side, there will be an increasing number of disputes as to the collateral agent's/trustee's role and duties, any potential liabilities in the event of collateral shortfall or mismanagement, and claims for injunctions (rightly or wrongly) restraining (or

ALEX POTTS

mandating) payment of collateral assets pending resolution of the underlying disputes.

On the insolvency and restructuring side, there will a number of contentious issues arising out of the appointment of liquidators over ILS structures (which are designed to be insolvency-remote, although the risk is impossible to exclude), and the inevitable cross-border recognition and enforcement issues associated with structures of this sort.

There is also likely to be an increase (although further into the future) in claims against directors, officers and professional service providers in the ILS space, including the independent index service providers, the fund administrators/NAV calculation agents, and the lawyers. Much will depend on the outcome of the current crop of D&O and professional negligence claims that are currently before the Bermuda court.

What I cannot predict, of course, is the timing, nature and extent of the (insured) catastrophes that are needed to make this all happen. But that is a tedious job that can be done by actuarial gadgets and models.

Colonization of the continental shelves

It does not take a visionary to notice that international financial centres and offshore jurisdictions, including Bermuda, have come under enormous pressure from international organisations such as the OECD and the G8, the United Kingdom, the United States, and other foreign governments and trading partners, to ensure compliance with the highest standards of regulation in areas such as tax information exchange, anti-money laundering, anti-corruption, anti-terrorist financing, the regulation of banking and financial services, the disclosure of beneficial interests, the proceeds of crime, consumer protection, environmental protection, and the protection of human rights.

The Bermuda Government, and associated departments and agencies, deserve great credit for the domestic legislation and regulations that have been enacted, amended and re-amended over the years to satisfy international pressure and expectations. The OECD has called Bermuda a "*key player*" in the area of international tax co-operation; David Cameron has confirmed that it is not "*fair any longer to refer to any of the Overseas Territories or Crown Dependencies as tax havens... they have fair and open tax systems*"; US Treasury official, Robert Stack, has acknowledged Bermuda's role "*as a leader in global tax transparency*"; and Bermudian Chief Justice Ian Kawaley has expressed the view that "*Bermuda has clearly impressed its legal personality on the public international law stage*".

Whether this increased level of regulation is good for international and local business based in Bermuda is obviously a matter for debate. Whatever one's views of the merits,

PREDICTION IS A THANKLESS TASK BUT AN INCREASE IN REGULATORY ENFORCEMENT AND PUBLIC LAW DISPUTES LOOKS ON THE CARDS

however, I predict that as a direct result of this regulatory creep in (or colonization of) Bermuda, we will see (and have already started to see) an explosion in the number of regulatory enforcement actions and commercial public law disputes brought before the Bermuda courts (and various regulatory tribunals), including prosecutions for civil fines and penalties, judicial review applications, statutory appeals, planning appeals, and constitutional challenges.

The disease of boredom: the gloriousness of work

Finally, the other area where Bermuda's courts and lawyers are likely to be kept busy over the next few years is in the trusts and estates area. Although trust-busting claims are nothing new, there are likely to be an increasing number of imaginative and legally ground-breaking trust disputes brought before the Bermuda courts (often as part of a multi-jurisdictional litigation and restructuring strategy). There continue to be a number of high-value trusts and asset-holding structures (including private trust companies and life insurance policy structures) established and maintained in Bermuda by wealthy individuals, with ever-growing numbers of (unpaid) creditors, (bored) beneficiaries, (disgruntled) divorcees, and (disinherited) offspring. A number of these structures are highly illiquid and insolvent, and that, in turn, is likely to generate an interesting wave of liquidations, restructurings, and trust-related insolvency disputes.

Conclusion

History shows that predicting the future is a thankless task, and that past performance is no guide at all.

For the time being, however, I am bullish on Bermuda as a jurisdiction for the resolution of some fascinating disputes over the next 5 years. I would be very happy to report back in due course to reflect on my predictions, if I am invited to do so.

Alex Potts is a Partner at Sedgwick Chudleigh Ltd.

Extreme prejudice - without-prejudice privilege in action

Felicity Toube QC looks at the thorny questions raised by the privilege attaching to settlement

Settlement negotiations are always tricky. One side will be asking for the moon, and the other will be demanding the earth. The demands of your opponent will always be too high, although it is possible that some might say that your own client is making unreasonable requests. One side will be asking for an indemnity, and the other will be refusing it on the basis that it will never be called on (but they still do not want to give an indemnity anyhow, just in case it might be).

Sometimes all of this argy-bargy gives rise to a settlement with which both sides are happy (or even equally unhappy). This is a good result. But what if someone else wants to know about the result?

In one recent case of mine, a co-defendant repeatedly (and with increasing shrillness) insisted that he was entitled to see the schedule to a Tomlin order. Of course, he was denied access to the schedule. Settlements are privileged even against co-defendants in the same liquidation.

In another of my recent cases, a liquidator wanted to see documents in order to test whether there had been any breach of the secret dealing rule in relation to a scheme of arrangement (invoking *Somji v. Cadbury Schweppes Plc* [2000] EWCA Civ 340). The claim was a non-starter as the settlement was between creditors rather than between the creditor and the company (or its office-holder or other representatives). However, even before getting to that question the liquidator insisted that he had to see the documents. Moreover, the liquidator insisted that the court must always inspect the documents in question before upholding a claim to privilege (relying on the Australian case of *Grant v Downs* [1976] 135 CLR 674). In this case, the court chose not to do so although it did take evidence in private from one of the parties to the settlement and also read private witness evidence. In the end, the court was more than satisfied that there was no potential for any breach of the secret dealing rule.

But what are the priciples? When and where is privilege to be maintained? And how, if at all, can it be interrogated by the Court?

The law on without prejudice privilege

If a party claims privilege, the burden of proof is on it to establish it (*West London Pipeline and Storage v. Total* [2008] EWHC 1729 (Comm) at para 86.

The basic rule is helpfully summarised in Passmore on Privilege (2nd ed., 2006), para 10.002.

"Communications made between the parties to a dispute that are written or made with the aim of genuinely attempting to settle that dispute cannot usually be admitted in evidence, nor made the subject of a disclosure order, whether in the proceedings (if any) to which the dispute gives rise, or in any other litigation in which the contents of such communications are relevant".

It is well established that this privilege belongs to both sides and cannot be waived by one side alone.

The 'without prejudice' privilege is applicable to any communications which are genuinely aimed at avoiding litigation.

(a) In *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 Lord Griffiths at pp 1299-1300 noted that *"The rule applies to exclude all negotiations genuinely aimed at settlement"*.

(b) *In Forster v Friedland* (10 November 1992, unreported, Court of Appeal) Hoffmann LJ (page 3) summarised the position as follows:-

"All that is necessary …is that negotiations must be 'genuinely aimed at settlement', that is, the avoidance of litigation. Provided that this criterion is met, the nature of the proposals put forward or the character of the arguments used to support them, are irrelevant …The communication will be protected if there is an intention to speak without prejudice followed by a genuine proposal or genuine negotiation aimed at avoiding litigation".

In order for the protection to arise, therefore, it is not necessary for litigation to

have commenced, or for the parties who are negotiating to be involved in litigation. All that is necessary is for the communications to be genuinely aimed at avoiding litigation.

As is well known, the 'without prejudice' privilege rule is based largely on public policy considerations. As Oliver LJ put it in *Cutts v Head* [1984] Ch 290 at p.306:

"That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings".

The rule has also been said to be based on the concept of an implied agreement between the parties to the negotiations not to disclose the contents of those negotiations to third parties.

(a) *Cutts v Head* [1984] Ch 290 per Oliver LJ at p.306:

"The protection from disclosure of without prejudice negotiations rests in part upon public policy and in part upon convention (i.e. an express or implied agreement that the negotiations shall be so protected)";

(b) *Unilever plc v Proctor & Gamble Co* [2000] 1 WLR 2436 per Robert Walker LJ at pp 789-790:

"The rule…[is] based at least in part on public policy. Its other basis or foundation is in the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite the negotiations, a contested hearing ensues".

The 'without prejudice' rule results in not only the inadmissibility of such communications in evidence, but also to the disclosure of such communications. As a result, such documents cannot be made the subject of a disclosure order (*Rabin v Mendoza & Co* [1954] 1 WLR 271 at pp 273-4, *"an order for production will not be made"*). This remains the case even in relation to disclosure orders between the parties to the correspondence themselves, as Lord Griffiths made clear in *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 at pp 1303-4.

THERE IS SOMETHING ABOUT A CLOSET THAT MAKES A SKELETON TERRIBLY RESTLESS.

The rule also, of course, enables both parties to the negotiations to keep the content of those negotiations confidential from third parties, even within the same litigation. In *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280, the claimant entered into a settlement agreement with the first defendant and continued the claim against the second defendant. The second defendant sought disclosure of the negotiations between the claimant and the first defendant which had resulted in that settlement agreement. The House of Lords held that the 'without prejudice' rule protected the negotiations from disclosure, and that the second defendant was not entitled to disclosure of them. As Lord Griffiths put it at p.1305:

"The general public policy that applies to protect genuine negotiations from being admissible in evidence should be extended to protect those negotiations from being discoverable to third parties."

Although it began as a rule which applied only to admissions contained in the negotiation documents, it is clear that the 'without prejudice' rule in fact extends to the entirety of the communications.

(a) *Cutts v Head* [1984] Ch 290 per Oliver LJ at p.306D (the rule extends to "anything that is said in the course of such negotiations").

(b) *Unilever plc v Proctor & Gamble Co* [2000] 1 WLR 2436 per Robert Walker LJ at pp 2448-9:

"to dissect out identifiable admissions and withhold protection from the rest of the without prejudice communications …would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties";

(c) *Wilkinson v West Coast Capital & Ors* [2005] EWHC 1606 (Ch) per Mann J at paras 15-16:

"Protecting against admission against interest in the narrow sense is not the only thing to be achieved. A more general freedom to negotiate is also part of the same package".

FELICITY TOUBE QC

The 'without prejudice' rule is not limited to the proceedings which the parties were seeking to settle. It extends to protect the negotiations from disclosure in later proceedings in circumstances where the point at issue in the earlier proceedings remains unresolved. See *Ofulue v Bossert* [2009] AC 990.

It is not open to another litigant to invite the Court to draw adverse inferences from the fact of non-disclosure. As Jacob LJ explained in *Reed Executive plc v Reed Business Information Ltd* [2004] 1 WLR 3026 at para 36:

"*Before parting with the general question there is one other matter I should mention. Suppose one party is prepared for the 'without prejudice' negotiations to be disclosed and the other not. Is that a matter that can be taken into account in deciding costs – with some sort of adverse inference to be drawn against the party refusing disclosure? Mr Hobbs did not advance such a case, though the point was raised by the Court prior to the hearing. He was right and realistic not to do so.* ***The rule, based on convention, is that the negotiations cannot be used. If an adverse inference were to be drawn against a party refusing disclosure there would be clear indirect pressure on it to permit disclosure. That would be contrary to the basis of the completely without prejudice negotiations***".

There are exceptions to the without prejudice rule (see *Unilever* at p.2444 and also *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* and others [2010] UKSC 44). These include the admission and/or disclosure of without prejudice communications:-

(a) as evidence of a concluded settlement agreement;

(b) if they provide evidence to set aside a settlement agreement on the grounds of misrepresentation, fraud or undue influence;

(c) as evidence of statements made by one party and relied upon by another giving rise to an estoppel, even where no settlement agreement is concluded;

(d) as evidence of perjury, blackmail or other unambiguous impropriety;

(e) as evidence of the fact (but not the detail) of without prejudice communications to justify a delay;

(f) as evidence that a claimant has acted reasonably in mitigating its losses by settlement (to the extent it evidences such reasonableness);

(g) as evidence where both parties to the privileged communication either expressly or impliedly agree that it should be admitted. An obvious example is where a communication marked "without prejudice save as to costs" can be used after the conclusion of a hearing on the determination of costs issues;

(h) as evidence that a settlement agreement should be rectified;

(i) as evidence of part of the "factual matrix" or surrounding circumstances that would, but for the without prejudice rule, be used as an aid to construing a settlement agreement. (Note, however, that apart from evidence going to the factual matrial, evidence of what was said or done in the course of negotiating an agreement is not admissible when determining what that agreement means *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38).

Should the court examine the documents to see if a claim to privilege can be maintained?

An assertion of privilege and a statement

of the purpose of the communication over which privilege is claimed in an affidavit are not determinative, but it is difficult to go behind an affidavit claiming privilege. (*West London Pipeline and Storage v. Total* [2008] EWHC 1729 (Comm) at para 86.)

Such an affidavit claiming privilege

"*is conclusive unless it is relatively certain from:*

(a) the statements of the party making it that he has erroneously represented or has misconceived the character of the documents in respect of which privilege is claimed…

(b) the evidence of the person who or entity which directed the creation of the communications or documents over which privilege is claimed that the affidavit is incorrect…

(c) the other evidence before the court that the affidavit is incorrect or incomplete on the material points…"

(*West London Pipeline and Storage v. Total* [2008] EWHC 1729 (Comm) at para 86)

If the Court is not satisfied on the basis of such other evidence that the affidavit does in fact on its face uphold the claim, it has four options:-

(a) To conclude that there is no privilege.

(b) To order a further affidavit to deal with any matters that were unsatisfactory in the original affidavit.

(c) To inspect the documents.

(d) To order cross examination of the deponent.

(*West London Pipeline and Storage v. Total* [2008] EWHC 1729 (Comm) at para 86)

Inspection of the documents is a "*solution of last resort*" (*West London Pipeline and Storage v. Total* [2008] EWHC 1729 (Comm) at para 86.) Further, cross-examination is reserved for the most "*extreme*" cases (at para 91).

The matter was put even more starkly by Mr Justice Simon in *National Westminster Bank plc v Rabobank Nederland* [2006] EWHC 2332 (Comm), in which he concluded in paragraphs 53 et seq that the remedy of requiring the disclosing party to make good its claim for privilege by an appropriate affidavit is always the preferred course, and that the remedy of looking at the documents is a solution of last resort. He concluded in the following terms in paragraph 60:

Inspection of documents by the Court is a method of last resort...

"*While not wishing to set out an exclusive list, in my view the court should not inspect documents unless there is credible evidence that the lawyers have either misunderstood their duty or are not to be trusted, and where there is no reasonably practical alternative*".

The same point was made in *Atos Consulting Ltd v Avis plc* [2007] EWHC 323 (TCC), in which Mr Justice Ramsay held in para 37: "*I accept and adopt the principle that looking at the documents should be a matter of last resort*". Mr Justice Ramsay summarised the proper approach as follows:

"*(1) The Court has to consider the evidence produced on the application.*

(2) If the Court is satisfied that the right to withhold inspection of a document is established by the evidence and there are no sufficient grounds for challenging the correctness of that asserted right, the Court will uphold the right.

(3) If the Court is not satisfied that the right to withhold inspection is established because, for instance, the evidence does not establish a legal right to withhold inspection then the Court will order inspection of the documents.

(4) If sufficient grounds are shown for challenging the correctness of the asserted right then the Court may order further evidence to be produced on oath or, if there is no other appropriate method of properly deciding whether the right to withhold inspection should be upheld, it may decide to inspect the documents.

(5) If it decides to inspect then having inspected the documents it may invite representations".

Whilst a court always retains the power to inspect the documents in question, the Court should not always exercise this power; nor does it always need to do so. In fact to do so is a method of last resort, only to be used where the Court has sufficient evidence to go behind the affidavit asserting privilege, and even then where there is no other option.

As it was put in the Australian case of *Grant v Downs* [1976] 135 CLR 674 at paragraph 28:

"*[28] It is well accepted that the court in allowing production and inspection of documents exercises a judicial discretion. In so doing it needs to scrutinize with care claims of privilege made on the ground now under consideration. It is for the party claiming privilege to show that the documents for which the claim is made are privileged. He may succeed in achieving this objective by pointing to the nature of the documents or by evidence describing the circumstances in which they were brought into existence. But it should not be thought that the privilege is necessarily or conclusively established by resort to any verbal formula or ritual. The court has power to examine the documents for itself, a power which has perhaps been exercised too sparingly in the past, springing possibly from a misplaced reluctance to go behind the formal claim of privilege. It should not be forgotten that in many instances the character of the documents the subject of the claim will illuminate the purpose for which they were brought into existence*" (emphasis added).

As a result, in most cases the explanation that the communications in question genuinely seek to avoid litigation will be plausible, and there will be nothing to cast doubt on that explanation. In such a case, the Court will uphold the claim to privilege, and will not inspect the documents.

Schemes of arrangement in relation to foreign companies: recent developments

Barry Isaacs QC looks at the likely consequences of the decisions in *Re Drax Holdings Ltd*, *Re Rodenstock GmbH* and *Re Apcoa Holdings GmbH*

In recent years schemes of arrangement have become an increasingly important tool for restructuring lawyers. This is in no small part because, so long as the majorities required by Part 26 of the Companies Act 2006 are obtained and the scheme is fair, a company's debt may be restructured without the unanimous consent of creditors. One particular area of interest and growth is the use of schemes of arrangement to restructure the debts of foreign companies. This is likely to increase following the recent sanction of schemes of arrangement in relation to APCOA Parking GmbH and associated companies.

Re Drax Holdings Ltd

The effect of section 895 of the Companies Act 2006 is that the court may sanction a compromise or arrangement proposed between a company and its creditors, or any class of them, or its members, or any class of them. "Company" is defined as any company liable to be wound up under the Insolvency Act 1986.

The Insolvency Act 1986 confers jurisdiction on the court to wind up both insolvent and solvent foreign companies. The 1986 Act contains no jurisdictional restriction referable to the company's place of incorporation, COMI or establishment. However, the courts have imposed three conditions for the making of a winding up order in relation to a foreign company, namely:

i) that the company has a sufficiently close connection with England usually, but not invariably, in the form of assets within the jurisdiction;

ii) that there is a reasonable possibility of benefit accruing to creditors from the making of a winding up order; and

iii) that one or more persons interested in the distribution of assets are persons over whom the English court could exercise jurisdiction (*Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116).

The first condition ensures that the English court declines to exercise a prima facie exorbitant jurisdiction save where it is appropriate to do so. The exorbitancy arises from the fact that the court has no territorial jurisdiction over the place of incorporation or, as the case may be, place of business of the company; and because, all other things being equal, the appropriate forum for the winding up of a company is the court having jurisdiction in its place of incorporation. The second and third conditions ensure that the court will only make orders where some useful purpose will be served.

The use of schemes of arrangement to restructure the debts of foreign companies …. is likely to increase following [Re] APCOA Parking GmbH

DRAX POWER STATION. *RE DRAX HOLDINGS LTD* ESTABLISHED THAT THE SUFFICIENT CONNECTION TEST APPLIES TO SCHEMES OF ARRANGEMENT IN RELATION TO FOREIGN COMPANIES.

In *Re Drax Holdings Ltd* [2004] 1 BCLC 10, Mr Justice Lawrence Collins held that these three conditions go to the discretion of the court to sanction a scheme of arrangement in relation to a foreign company, and that the court should not exercise its jurisdiction unless a sufficient connection with England is shown.

Re Drax Holdings Ltd concerned Cayman and Jersey companies, so the implications of the Insolvency Regulation and the Judgments Regulation were not relevant to the decision. These issues were not considered in detail until the decision of Mr Justice Briggs in *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch) [2011] Bus LR 1245.

Re Rodenstock GmbH

The Insolvency Regulation and the Judgments Regulation substantially curtail the jurisdiction of the English court to wind up companies. The effect of Articles 1.2(a), 3.1 and 3.2 of the Insolvency Regulation is that, in relation to an insolvent company with its COMI in a Member State other than the UK, the English court has jurisdiction to wind up only if the company possesses an establishment within the UK. The effect of Article 22.2 of the Judgments Regulation is that the English court has no jurisdiction to wind up a solvent company where the company has its seat in a Member State other than the UK.

In *Re Rodenstock GmbH*, it was held that proceedings seeking the court's sanction of a scheme of arrangement in relation to a solvent company do not fall within the scope of the Insolvency Regulation; but they do fall within the scope of the Judgments Regulation, and there is nothing in Chapter II of the Judgments Regulation (relating to jurisdiction) which excludes the court's jurisdiction in relation to the sanctioning of schemes.

In many schemes, the case for a sufficient connection with this jurisdiction depends upon the combination of the lenders' choice of English law and English jurisdiction as governing their lending relationship with the company. *Re Rodenstock GmbH* raised in stark form the question whether an English law legal relationship (including a choice of English jurisdiction) was, on its own, sufficient to establish a sufficient connection with this jurisdiction to justify its application to the affairs of a foreign company as being less than exorbitant. Mr Justice Briggs held that the lenders' choice of English law had the consequence that their rights as lenders were liable to be altered by any scheme sanctioned by a court (whether or not the English court) to the extent that English law recognised the jurisdiction of that court to do so.

BARRY ISAACS QC

For that reason, the connection with this jurisdiction constituted by the choice of English law and exclusive jurisdiction was sufficient for the purpose of permitting the exercise by the English court of its scheme jurisdiction.

Re APCOA Parking GmbH

Re APCOA Parking GmbH and others [2014] EWHC 997 (Ch), [2104] EWHC 1867 (Ch) concerned applications for the sanction of schemes of arrangement which were proposed by companies incorporated in Germany, Belgium, Austria, Denmark and Norway. The companies' assets and COMI were outside the UK. Each company was a borrower under a Facilities Agreement which, as incepted, was governed by German law and subject to the exclusive jurisdiction of the courts of Frankfurt/Main.

The novelty of these schemes of arrangement, and their significance, arises from the fact that the governing law and jurisdiction clauses were amended shortly before the schemes were proposed, for the specific purpose of attracting the scheme jurisdiction of the English court. The amendments were passed by a majority vote of creditors in accordance with the Facilities Agreement. The English court received uncontested evidence of local law that the amendments and an order sanctioning the schemes would be recognised in each of the overseas legal systems. The principal question for the English court was whether there was a sufficient connection with the jurisdiction for the exercise of the court's scheme jurisdiction.

The court considered the governing law and exclusive jurisdiction clauses in the Facilities Agreement as amended. So far as concerns the former, Article 3.1 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome 1") provides that a contract shall be governed by the law chosen by the parties; and that, by their choice the parties can select the law applicable to the contract. Article 3.2 provides that the parties may at any time agree to subject the contract to a law other than that which previously governed it. These Articles give effect to Recital (11) of Rome 1, which provides that the parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations. It follows that there was no objection to the change of governing law of the facilities agreement to English law.

The question of whether an obligation is discharged or varied is governed by its proper law (*Wight v Eckhardt Marine GmbH* [2004] 1 AC 147). In accordance with generally accepted principles of private international law, and under Rome I, a variation of contractual rights in accordance with the governing law will usually be given effect in other countries. It is because the courts of

THE APCOA PARKING GROUP MANAGES 1.3 MILLION PARKING SPACES THROUGHOUT EUROPE.

the countries in which the applicant companies were incorporated would give effect to a variation of the terms of the Facilities Agreement in accordance with English law that the English governing law of the Facilities Agreement gave rise to a connection with this jurisdiction.

The jurisdiction clause was excluded from Rome 1 by Article 2(e); it fell within Article 23 of the Judgments Regulation. This provides that, if the parties, one or more of whom is domiciled in a Member State, have agreed that a court of a Member State is to have jurisdiction to settle any disputes, that court shall have jurisdiction. The principle at play is again freedom of contract (*Kurz v Stella Musical Veranstaltungs GmbH* [1992] Ch 196). Where a contract is governed by an exclusive jurisdiction clause in favour of the English court, considerations of comity favour the exercise of such jurisdiction, because those parties whose rights are affected thereby have agreed that the English court has jurisdiction (*OT Africa Line Ltd v Magic Sportswear Corporation* [2006] 1 All ER (Comm) 32). For these reasons, there was a sufficient connection for the exercise of the English court's scheme jurisdiction.

The universe of companies which may be restructured using schemes of arrangement includes those whose debts are governed by overseas law and jurisdiction clauses upon inception

It follows that the universe of companies which may be restructured using schemes of arrangement includes those whose debts are governed by overseas law and jurisdiction clauses upon inception. If the governing law and jurisdiction clauses of the debt agreements are amended in accordance with the local law to English governing law and jurisdiction, the company's debts should be treated by the English court in the same way as any other debts governed by English law and jurisdiction. This should constitute a sufficient connection with the English court for the exercise of its jurisdiction to sanction a scheme of arrangement which varies the terms of those debts.

NEWS in brief

Rise in Young Female Personal Insolvencies

The rise of personal insolvencies amongst women aged 18 to 24 has hit the tabloid press recently following the release of the 2013 statistics from the Insolvency Service. Louise Brittain, of Wilkins Kennedy, suggests that celebrity culture may be influencing the spending culture: "There's now an enormous emphasis on the way people look as it's also a case of people wanting to emulate celebrities. But the impact on people like Kerry Katona from having financial problems just isn't as publicised as the rest of their lifestyles". Nearly eight in every 10,000 young women went into insolvency last year, but Stuart Frith, of Stephenson Harwood, issues a further caution that the figures may mask an even greater problem. The Insolvency Service figures "do not capture those in informal debt management plans".

KERRY KATONA

Oh!, to be beside the seaside

Coastal Areas of England and Wales apparently have the highest levels of personal insolvency figures from the Insolvency Service show. Seaside resort areas in the North East, South West and East Midlands had the highest concentration of insolvent individuals in 2013 taking into account bankruptcies, IVAs and DROs. Stuart Frith, chair of R3's personal insolvency committee said, "The North East, South West and seaside towns have been the personal insolvency hotspots in England and Wales for some time. The nature of the labour market in these places explains why personal insolvency is so prevalent: simply, unemployment is much higher than elsewhere or the available jobs are short terms or low paid".

'Fast Eddie'

The self-styled lord nicknamed "Fast Eddie" has been ordered to pay £13.9 million pounds by Westminster magistrates' court after masterminding a fraud that charged advance fees for commercial loans it never provided. Edward Davenport, 47, was originally convicted of conspiracy to defraud in 2011 for his role in Gresham, a company masquerading as a long-established financial organisation capable of offering hundreds of millions of pounds in funding. The SFO said Gresham had taken more than £4 million in fees from over 100 applicants for its loans, typically construction projects in Europe but also in North America, India and the Caribbean between 2006 and 2009. Davenport has been disqualified from acting as a company director for 10 years.

Barrister disbarred for tax fraud

A former 1 Gray's Inn Square barrister jailed last year for tax evasion was struck off by the Bar Standards Board (BSB) in May.

A disciplinary tribunal, chaired by former deputy circuit judge HH Mr Stuart Sleeman, found that former criminal barrister Edward Agbaje had engaged in dishonest conduct, cheating the public revenue out of £77,265 between September 2004 and March 2012. Agbaje was convicted at the Old Bailey last year and sentenced to 15 months imprisonment.

The court heard he had been declared bankrupt in 1999 and 2008, despite collecting more than £59,000 in VAT on fees from clients.

He confessed to have gambled the proceeds.

Gib lawyers jailed

Three brothers who ran one of Gibraltar's largest law firms, Marrache & Co, have been jailed for fraud. Benjamin, Isaac and Solomon Marrache were found guilty following a trial which was adjourned 47 times and where the jury was discharged in November 2013 and the Judge, Mr Justice Grigson, continued to hear the case alone.

Recommendations to Clean Up Pre-Packs

An independent review into pre-pack administrations commissioned by Business Secretary Vince Cable identified major deficiencies in current pre-pack practices, but rejected calls for an outright ban. The review, conducted by Teresa Graham CBE, concluded that the abolition of pre-packs would be akin to "throwing the baby out with the bathwater". Instead, the report, published in June, proposed six measures to remedy the existing shortcomings. These include the requirement for connected party purchasers to obtain an independent opinion from a "pre-pack pool" of independent professionals prior to a sale taking place. Connected party purchasers are also urged to complete a "viability review", setting out how the purchaser will survive for at least 12 months from the date of the review and what it will do differently to the insolvent company to avert further failure. Graham has invited the insolvency industry to adopt the proposals voluntarily, without the need for new legislation. It is hoped the measures will improve transparency and restore confidence among creditors.

Hacking trial costs

Rebekah Brooks and four further defendants walked free from the Old Bailey in June following a 138-day show-piece trial costing approximately £100m.

"We have probably the most expensive case in the country here," the trial judge observed.

The continued expense to the Metropolitan Police, currently at £30m, exceeds the cost of Operation Yewtree by more than £25m.

Wonga to pay compensation

The UK's biggest payday loans company, Wonga, agreed to compensate 45,000 customers £2.6m in June, having issued letters threatening legal action from bogus quasi-legal businesses 'Chainey, D'Amato & Shannon' and 'Barker and Lowe Legal Recoveries'. The practice took place between October 2008 and November 2010 and was uncovered by the Office of Fair Trading (OFT) the following year. The Financial Conduct Authority (FCA) – which took charge of the investigation in April following the disbandment of the OFT – found further evidence that Wonga had charged its customers' accounts to cover administration fees associated with sending the letters. The FCA does not have the power to fine Wonga for errors made prior to its regulation by the FCA. However it praised the loans company for its cooperation with the inquiry.

WONGA. £2.6M SLAP ON THE WRIST

Bankrupt Footballers

Two former Premier League football stars have been declared bankrupt. David James, the former England and Liverpool goalkeeper and who starred as England's goalkeeper in the 2010 World Cup, filed his own bankruptcy petition at the Hertford County Court in May 2014. Chris Sutton, the former Blackburn, Chelsea and Celtic striker, also became a bankrupt in May 2014.

CHRIS SUTTON

DAVID JAMES

Wall Street bank fines

Wall Street banks and their foreign rivals have paid out $100bn in US legal settlements since the financial crisis, according to Financial Times research, with more than half of the penalties extracted in the past year.

During stress tests last week, the Federal Reserve found that the biggest banks could still face a further $151bn bill for operational risk, repurchasing soured mortgage bonds and dealing with the falling value of buildings they own.

Director Disqualifications on the way Up

There were 3,721 compulsory liquidations and creditors' voluntary liquidations in England and Wales during the first quarter of 2014 – an increase of 4.8% on the previous quarter and 4.9% more than the corresponding quarter in 2013. This includes 1,072 compulsory liquidations, which rose by 53.1% on the last quarter, and 2,649 creditors' voluntary liquidations, which fell by 7.1% in the same period.

Smokey

In life one rarely meets a truly good man. Well in Smokey Thompson there was one. For those who did not know him Smokey was a Bermudian. He did many jobs there. In particular he was the most amazing taxi driver you could ever meet. Much more than a taxi driver to everyone though, including the team from South Square who did the Thyssen case in Bermuda in the late 1990s and early 2000s. He did everything to help people visiting his beloved Bermuda. From drive, to shop, to entertaining you on a Saturday and to ensuring you made the plane out on time. He just wanted to make sure that every visitor to his home had a good time. And he had an amazing life. A sportsman. A passionate West Indies cricket fan. A true ambassador for Bermuda. A man who seemed to know everyone there. Someone who had looked after, and took real pride in doing so, such rarified people as Charlton Heston, Michael Bloomberg and the Rolling Stones when they visited Bermuda. And a man always full of laughs. No one could forget his laugh. Nor could they forget the toot of his horn as he drove round Bermuda crying out to his friends as he passed by. Or his kind words, encouragement and total integrity. Smokey was a friend to a number of us at South Square and many of our friends in Bermuda. And those of us who knew him will always remember him as one of the giants who walked the planet. Smokey Thompson was born on 20 March 1934. He passed away on 21 May 2014. He is survived by his wife, Cynthy and more children, grandchildren, great grand-children and friends than it is possible to count. He will be missed by many. And he will certainly be missed by those of us here who knew him.

Judicial News

■ Lord Justice Moses ceased to be a Court of Appeal judge with effect from 21 June 2014.

■ Lord Justice Moore-Bick is to be appointed as Vice-President of the Court of Appeal (Civil) with effect from 1 October 2014.

■ Mr Justice Flaux was appointed by the Lord Chief Justice as Judge in Charge of the Commercial Court with effect from 3 July 2014. Mr Justice Flaux, who was appointed as a Deputy High Court Judge in 2002 and as High Court Judge in May 2007 replaces Mr Justice Field.

■ HH Judge William Easthope Davis QC was appointed as a High Court judge with effect from 1 May 2014 on the retirement of Mr Justice Silber. He has been assigned to the Queen's Bench Division.

■ HH Judge Roderick Brian Newton was appointed as a High Court Judge with effect from 9 May 2014 on the death of Mrs Justice Baron. He has been assigned to the Family Division.

■ Jennifer Roberts QC was appointed as a High Court Judge with effect from 3 June 2014 on the retirement of Mr Justice Coleridge. She has been assigned to the Family Division.

■ Mark David John Warby QC was appointed as a High Court Judge with effect from 10 June 2014 on the retirement of Mr Justice Tugendhat. He has been assigned to the Queen's Bench Division.

■ Richard William Goss QC will become a High Court Judge with effect from 1 October 2014 on the retirement of Mr Justice Royce on 27 August 2014. He will be assigned to the Queen's Bench Division

■ Registrar Nicholls retired as a Bankruptcy Registrar with effect from 1 May 2014.

South Square is pleased to welcome two new tenants from 1st October 2014.

Andrew Shaw

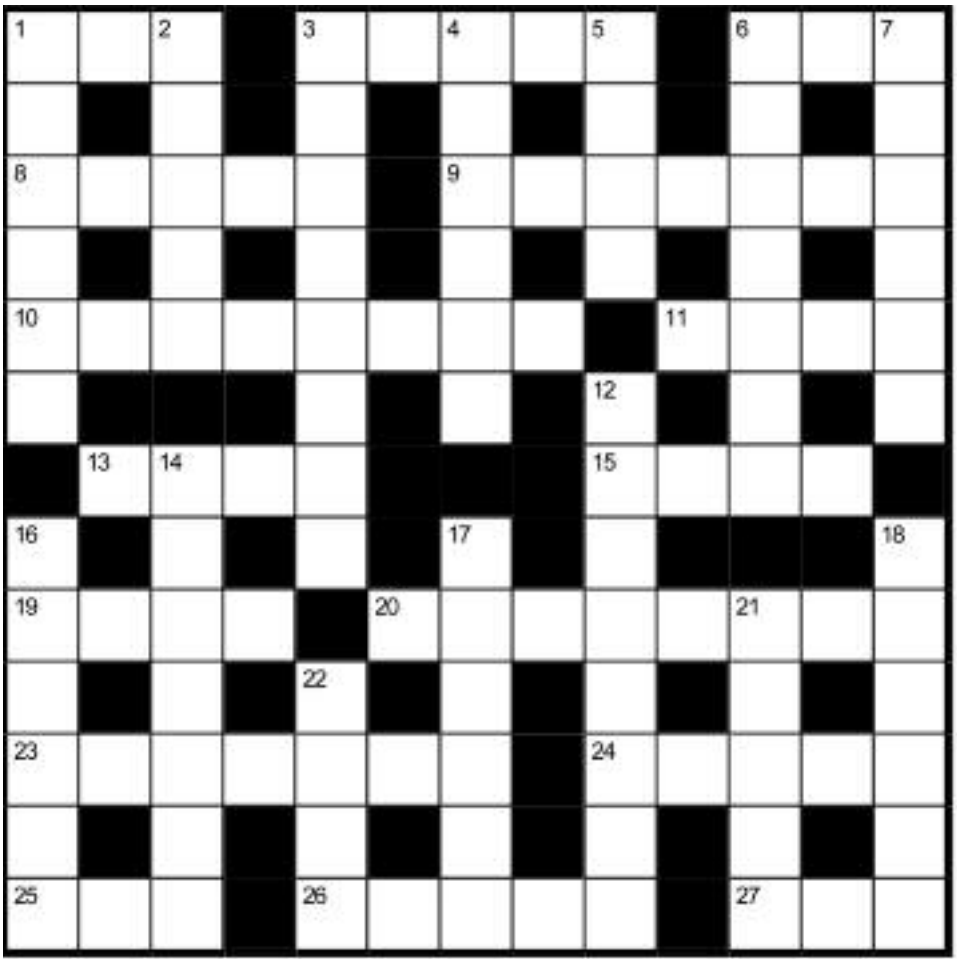
After graduating from Oxford University with a first class Master of Chemistry degree, Andrew joined the Royal Marines. In the course of a busy 10 years, he took part in a wide variety of operations, both in the UK and overseas. He left the Royal Marines in 2011, as a major, in order to pursue a career as a barrister. Andrew completed the Graduate Diploma in Law at City University, achieving a distinction, and remained at City University to complete the BPTC. He was called to the Bar at Lincoln's Inn in 2013 as a Lord Mansfield Scholar, and was the top BPTC student of his year at Lincoln's Inn, for which he was awarded the Ede and Ravenscroft Prize. Andrew also received the Cholmeley Award and the Buchanan Prize for his performance on the BPTC. During his pupillage at South Square, Andrew sat with David Allison QC, Tom Smith QC, Richard Fisher, Daniel Bayfield, Lloyd Tamlyn, Stephen Robins and Marcus Haywood as his pupil supervisors. He has consequently had a broad exposure to Chambers' practice areas, and gained experience of high profile cases such as the Lehman Brothers Waterfall application and the *Constantin Medien AG v Ecclestone* trial.

Robert Amey

Robert obtained a degree in English law and French law from the Universities of Oxford and Paris II, and was called to the Bar by Lincoln's Inn in 2012, who awarded him the Denning, Hardwicke, JP Warner and Sunley Scholarships. As a student, Robert won The Times Advocacy Competition and the Lincoln's Inn Gluckstein Advocacy Prize, and was awarded essay prizes by the Bar Council and the Financial Services Lawyers Association. Before joining Chambers Robert was an associate at Deloitte. He also spent time working in the banking litigation department of a major international law firm and later as a judicial assistant to Advocate General Sharpston at the Court of Justice of the European Union. As a pupil, Robert gained experience in all of Chambers' core practice areas, including insolvency, banking, general commercial and sports law. During pupillage Robert saw two substantial trials, assisting Tom Smith QC during the Formula 1/Ecclestone trial (fraud), and Richard Fisher during the Federal Mogul trial (reinsurance). Robert also gained extensive experience of drafting and advisory work, including drafting pleadings and advice for insolvency matters, banking disputes and an arbitration between a major sports team and its governing body. In addition, Robert appeared as sole counsel in a final hearing before the Court of Appeal during his second six. In his spare time Robert enjoys sport, music and travelling.

South Square crossword

DEVISED BY CHRISTOPHER BROUGHAM QC



Some answers, or pairs of answers, give ten of a kind, past and present: all such answers must be highlighted.

ACROSS

1 Renegade (3)
3 Frivolous (5)
6 Vassal (3)
8 Transactions in Wildy's? (5)
9 Food in the Seven Stars? (3,4)
10 Involving the highest authorities (3-5)
11 African republic (4)
13 Male deer (4)
15 Recreational land (4)
19 Scottish town (4)
20 Beautiful flowering shrub (8)
23 Rest (3-4)
24 Poet (archaic) (5)
25 Ball supporter (3)
26 Anaesthetic (5)
27 Unit of weight (3)

DOWN

1 Further exam attempts (6)
2 Showy flower (5)
3 Take heed of (6,2)
4 Burrowing animal (6)
5 Pipe (4)
6 Demonstrator? (7)
7 Insignificant person (6)
12 Person representing another in court? (8)
14 Become attached (7)
16 Illuminated at dusk (6)
17 Belly (6)
18 Interconnected burrows (6)
21 Restriction (5)
22 Perforated nozzle (4)

SOUTH SQUARE CHALLENGE

Welcome to the South Square Challenge for the August 2014 edition. Again this is similar to previous challenges but not quite the same. Continuing with the geographical theme from the last edition of the Digest, this challenge is called "Where in the world am I?". So what you have is eight places somewhere in the world shown in the pictures below. To help you (but perhaps only a little) beside the picture of each place is a silk from Chambers who has appeared in court there relatively recently. All you have to do is to name the eight places and the silks who appeared there. Please send answers by email to kirstendent@southsquare.com or by post to Kirsten at the address on the back page. Entries by Monday 6 October 2014 please. To the winner, if necessary drawn from the wig tin, will go a magnum of champagne and an ever so useful South Square umbrella. Good luck. *David Alexander QC*

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MAY CHALLENGE

The correct answers to the May 2014 South Square Challenge were: (1) Nigeria (2) Peru (3) Russia (4) Spain (5) Brunei (6) Serbia (7) Cook Islands and (8) Netherlands Antilles. We has a lot of correct entries but the winner is Tom Lidstrom of Linklaters LLP (and his children, Freddie, aged 10, and Odessa, aged 8) to whom go a magnum of champagne and an ever so useful South Square umbrella.

Diary Dates

South Square members will be attending, speaking at and/or chairing the following events.

We look forward to seeing you at one or more of them.

South Square and Mourant Ozannes seminar
200, Aldergate, St. Paul's, London
11 September 2014

INSOL Europe Annual Congress
9-12 October 2014 - Istanbul, Turkey

R3 Ladies Lunch London
7 November 2014 – Park Plaza, Westminster Bridge, London

ILA Annual Dinner
27 November 2014 – Natural History Museum, London

INSOL International Annual Regional Conference
22-24 March 2015 – San Francisco, USA

R3 Annual Conference 2015
20-22 May 2015 – Grand Hyatt, Berlin

INSOL Europe Annual Conference
1-4 October 2015 - Berlin

INSOL – Dubai
24-26 January 2016,

INSOL 2017 Tenth World International Quadrennial Congress
19-22 March 2017 – Sydney, Australia

South Square also runs a programme of in-house seminars and talks - both in Chambers and onsite at our client premises - covering important recent decisions in our specialist areas of practice as well as topics specifically requested by clients. For more information, contact events@southsquare.com, or visit our website www.southsquare.com.

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SOUTH SQUARE: 'INCREDIBLE MEMBERS AT THE TOP OF THEIR GAME'

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Christopher Brougham QC
Gabriel Moss QC
Simon Mortimore QC
Richard Adkins QC
Richard Sheldon QC
Richard Hacker QC
Robin Knowles CBE QC
Mark Phillips QC
Robin Dicker QC
William Trower QC
Martin Pascoe QC
Fidelis Oditah QC
David Alexander QC

Antony Zacaroli QC
Glen Davis QC
Barry Isaacs QC
Felicity Toube QC
Mark Arnold QC
Jeremy Goldring QC
Lucy Frazer QC
David Allison QC
Tom Smith QC
John Briggs
Adam Goodison
Hilary Stonefrost
Lloyd Tamlyn

Daniel Bayfield
Richard Fisher
Stephen Robins
Joanna Perkins
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Adam Al-Attar
Henry Phillips
Charlotte Cooke
Alexander Riddiford
Matthew Abraham
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